Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit err in holding that the Clean Water Act authorizes a criminal conviction of a property owner for placing sand in isolated wetlands that do not abut a body of open water but lie approximately twenty miles from the nearest navigable waterway?

RULE 29.6 STATEMENT

John A. Rapanos appears as an individual with no corporate affiliations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

A. Factual and Procedural Background 4

B. The District Court Decision on Remand from This Court 5

C. The Sixth Circuit Decision on Remand from This Court 6

REASONS FOR GRANTING THE WRIT 7

I. THE LOWER COURT DECISION UNDERMINES THIS COURT'S DECISION IN *SOLID WASTE AGENCY* ON A QUESTION OF NATIONAL IMPORTANCE 8

II. CONGRESS DID NOT INTEND THE BROAD READING OF THE CLEAN WATER ACT ADOPTED BY THE SIXTH CIRCUIT IN THIS CASE 12

III. THE SIXTH CIRCUIT DECISION IN THIS CASE CONFLICTS WITH THE FIFTH CIRCUIT ON A QUESTION OF NATIONAL IMPORTANCE 15

TABLE OF CONTENTS—Continued

Page

IV. THE DECISION BELOW NOT ONLY EXCEEDS THE STATUTORY AUTHORITY OF THE CLEAN WATER ACT, IT ALSO RAISES SERIOUS CONSTITUTIONAL QUESTIONS ABOUT WHICH THIS COURT WARNED IN *SOLID WASTE AGENCY* 19

A. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Raises a Serious Question of Congress' Power Under the Commerce Clause 20

B. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Upsets the Federal-State Balance 22

C. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Undermines an Express Objective of the Clean Water Act to Defer to the Rights of the States 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983) 16

Deaton v. United States,
Docket No. 03-701 ..... 4, 8, 18

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,
485 U.S. 568 (1988) 20, 24

In re Needham,
WL 22953383 (5th Cir. 2003) 17-18

National Mining Association v. United States Army Corps of Engineers,
145 F.3d 1399 (D.C. Cir. 1998) 22

Newdunn v. United States,
Docket No. 03-637 ..... 4, 8, 18

Rice v. Harken Exploration Co.,
250 F.3d 264 (5th Cir. 2001) 16

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,
531 U.S. 159 (2001) ..... passim

Treacy v. Newdunn Associates, LLP,
344 F.3d 407 (4th Cir. 2003) 18

United States v. Hanousek,
176 F.3d 1116 (9th Cir. 1999) 14-15

United States v. Deaton,
332 F.3d 698 (4th Cir. 2003) 6, 18

United States v. Lamplight Equestrian Center, Inc.,
2002 WL 360652 15

TABLE OF AUTHORITIES—Continued

Page

United States v. Lopez,
514 U.S. 549 (1995) 20-21, 23

United States v. Morrison,
529 U.S. 598 (2000) 20-21

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) ..... passim

United States v. Wilson,
133 F.3d 251 (4th Cir. 1997) 22

United States Constitution

Art. I, § 8, cl. 3 1

Federal Statutes

33 U.S.C. § 1251(b) 24

§ 1311(a) 1, 4

§ 1319 14

§ 1344(a) 2

§ 1362(5-7) 2

Miscellaneous

Adler, Jonathan H., *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999) 23

PETITION FOR WRIT OF CERTIORARI

John A. Rapanos respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 339 F.3d 447 (6th Cir. 2003), Appendix (App.) A. The opinion of the district court is reported at 190 F. Supp. 2d 1011 (E.D. Mich. 2002), App. B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 5, 2003. That court's denial of the Petition for Rehearing En Banc was entered on September 29, 2003, App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The United States Constitution provides that Congress has power "[t]o regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a))

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water . . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5-7) (CWA § 502(5-7)).

STATEMENT OF THE CASE

In the context of a criminal conviction, this case presents a stark example of the real world danger suggested by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), if the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are given broad jurisdiction under the Clean Water Act to regulate wetland property located many miles from navigable waters. The Sixth Circuit has expanded federal CWA jurisdiction to include the "whole tributary system of any navigable waterway" including man-made drainage

ditches and isolated wetlands. Thus, the decision below criminalizes conduct that this Court has determined is beyond the reach of the Clean Water Act, as intended by Congress and constrained by the commerce power and fundamental principles of federalism.

For placing sand without a federal permit in nonnavigable, isolated,[1] intrastate wetlands on his property, John A. Rapanos was tried and convicted of violating the Clean Water Act, fined $185,000 and sentenced to three years probation. On appeal, the Sixth Circuit directed the trial court to increase the sentence to include a minimum of ten months in prison. But, this Court granted a writ of certiorari, vacated the conviction and remanded the case back to the Sixth Circuit for a determination consistent with *Solid Waste Agency* in which this Court determined that "isolated" wetlands, or wetlands not adjacent to navigable waters, were not subject to federal jurisdiction under the Clean Water Act.

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[1] The district court characterized the wetlands on Mr. Rapanos' property as "isolated" based on the following analysis:

> It is worth noting that the majority opinion in *Solid Waste Agency* repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *See Solid Waste Agency*, 531 U.S. [159,] 176 n.2, ([(2001)] (Stevens, J., dissenting). The dissent notes that the wetlands in *Solid Waste Agency* are at least ecologically connected. *See id.* Despite this, the majority still refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, [Rapanos'] wetlands may be considered "isolated" for purposes of the CWA.

App. B6 n.3.

Contrary to the decision of this Court, and in conflict with the Fifth Circuit, the Sixth Circuit upheld the conviction on remand on the same basis as before. Consequently, this case is brought before this Court on another Petition for Writ of Certiorari presenting the same question on which this Court originally granted certiorari: whether Clean Water Act jurisdiction extends to isolated wetlands not adjacent to any navigable waters. This case also follows on the heels of two other pending petitions raising a similar question. *See Newdunn v. United States* (Docket No. 03-637) and *Deaton v. United States* (Docket No. 03-701). Therefore, this Court should grant the writ and address the merits of this case.

A. Factual and Procedural Background

John A. Rapanos owns a 175-acre parcel of land in Williams Township, Michigan. This parcel includes nonnavigable, isolated, intrastate wetlands that were filled in 1988 or 1989 to enhance the property for sale and development. The parcel contains a man-made drainage ditch known as Labozinski Drain, which eventually empties into Hoppler Creek which flows into the Kawkawlin River and ultimately into Saginaw Bay. App. B7. The nearest body of navigable water to Mr. Rapanos' property is a point in the Kawkawlin River approximately twenty linear miles away. App. B7-B8. Therefore, the wetlands on Mr. Rapanos' property are not directly adjacent to any navigable water.

Mr. Rapanos placed sand in the wetlands on his property without a federal permit. As a result, he was prosecuted by the federal government and convicted in 1995 of two counts of "discharging pollutants into waters of the United States" without a permit in violation of section 301(a) of the Clean Water Act. *See* 33 U.S.C. § 1311(a). The trial court sentenced Mr. Rapanos to three years probation and a fine of $185,000. Mr. Rapanos appealed his conviction on jurisdictional grounds and the government cross-appealed his sentence, asking for ten

month's jail time. The Sixth Circuit dismissed Mr. Rapanos' appeal and remanded the case to the district court for resentencing, whereupon Mr. Rapanos sought a writ of certiorari from this Court. In 2001, this Court granted the writ, vacated the Sixth Circuit determination, and remanded the case to the Court of Appeals with instructions to reconsider the case in light of *Solid Waste Agency*. The Court of Appeals remanded the case back to the district court.

B. The District Court Decision on Remand from This Court

On remand, the government argued that the wetlands on Mr. Rapanos' property were "waters of the United States," and subject to federal regulation, because "the wetlands at issue were "hydrologically connected and 'directly adjacent to navigable waters.'" App. B5-B6. But, the court noted that *no finding of a "hydrological connection"* was ever made by either the jury or the court and that based on the jury instructions the jury might well have found "the wetlands at issue to be completely 'isolated' from any navigable waters." App. B6-B7. The court noted further that in *Solid Waste Agency* "the Supreme Court held that the Army Corps of Engineers lack[ed] the statutory authority to regulate wetlands that are completely isolated from any navigable waters." App. B7.

But even assuming some sort of "surface hydrological connection" between the wetlands and Labozinski Drain, a man-made drainage ditch, as the government argued, the district court found the nearest navigable waters about twenty miles away. On these facts, and what it termed a close review of *Solid Waste Agency* and *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the court found "as a matter of law, that the wetlands on [Mr. Rapanos'] property were not adjacent to navigable waters" and could not be regulated. App. B8.

The court determined *Solid Waste Agency* provided a mode of analysis that was applicable to this case. The district court expressly recognized that the reason this Court invalidated the "Migratory Bird Rule" in *Solid Waste Agency* was "because the CWA contains the words 'navigable waters,' which act as a limit on federal jurisdiction." App. B11. This is significant, the court concluded, because it showed "what Congress intended as its authority for enacting the CWA: 'its traditional jurisdiction over waters that were or had been navigable in fact or which reasonably could be so made.' " *Id.* (citing *Solid Waste Agency*, 531 U.S. at 172).

C. The Sixth Circuit Decision on Remand from This Court

The Court of Appeals reversed the trial court and reinstated Mr. Rapanos' criminal conviction. The Sixth Circuit ignored the guidance this Court gave in *Solid Waste Agency* and found that, "the *Solid Waste* Court, in a narrow holding," merely, "invalidated the Migratory Bird Rule." App. A10. Instead, the appellate court adopted the Fourth Circuit view in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), that *Riverside Bayview Homes* can be read broadly to authorize Clean Water Act jurisdiction over the whole tributary system of any waterway and that the Act reaches to the man-made drainage ditch and its "adjacent" wetlands in this case. App. A9-A10.

Without disputing the conclusion of the district court that *no finding of a "hydrological connection"* was ever made between the wetlands on Mr. Rapanos' property and the Labozinski Drain, and that the wetlands were not directly adjacent to any navigable waters, the Court of Appeals simply accepted the government's assertion that such a connection existed. From this "connection," the court concluded that "the Rapanos wetlands are covered by the Clean Water Act." App. A10.

The logic of the Court of Appeals is simple, if faulty: "Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act." *Id.* Thus, the Sixth Circuit adopted the principle rejected by this Court in *Solid Waste Agency*, and the Fifth Circuit, that any "hydrological connection" between a wetland and a navigable waterway is sufficient to establish federal jurisdiction under the Clean Water Act.

REASONS FOR GRANTING THE WRIT

Because this case involves an interpretation of Clean Water Act jurisdiction that exceeds both statutory and constitutional extremes, in the context of a criminal conviction on remand from this Court, this case is uniquely suited to review on the merits.

Section 404(a) of the Clean Water Act regulates the discharge of dredged or fill material into "navigable waters." The lower court has interpreted that provision to cover the filling of nonnavigable, isolated, intrastate, wetlands that are not immediately adjacent to a navigable water. Under the Sixth Circuit decision, any wetland with even a supposed "hydrological connection" to a distant navigable water body—like the wetlands in this case—may be regulated under the Act. But it does not stop there. According to the Sixth Circuit, the government may regulate "the whole tributary system of any navigable waterway," including the man-made drains, ditches, and isolated wetlands in this case.

That decision distorts the plain meaning of "navigable waters" and nullifies the express intent of Congress to limit federal jurisdiction in areas of land and water use in deference to the States. That decision also conflicts with the Fifth Circuit

and this Court's interpretation of the reach of section 404(a) as determined in *Solid Waste Agency*. Moreover, the Sixth Circuit decision raises an important question of whether Congress could exercise such authority consistent with the Commerce Clause; a question this Court avoided in *Solid Waste Agency* by limiting the scope of the Clean Water Act to traditional navigable waters and those wetlands that abut and are inseparably bound up with those waters.

I

THE LOWER COURT DECISION UNDERMINES THIS COURT'S DECISION IN *SOLID WASTE AGENCY* ON A QUESTION OF NATIONAL IMPORTANCE

Although this Court did not determine the exact meaning of "waters of the United States" in *Solid Waste Agency,* this Court did set express limits on the reach of those waters. Under *Solid Waste Agency*, only those wetlands that physically abut traditional navigable waters, and are inseparably bound up with those waters, are subject to federal jurisdiction.

Until *Solid Waste Agency* was decided, many courts and federal officials relied on *Riverside Bayview Homes* to justify EPA and Corps regulation of all wetlands without regard to their adjacency to "navigable waters." Even now, these agencies and many lower courts, including the Fourth Circuit in *Newdunn* (Docket No. 03-637) and *Deaton* (Docket No. 03-701), and the Sixth Circuit in this case, doggedly assert that *Solid Waste Agency* has not altered federal wetland jurisdiction beyond invalidation of the "Migratory Bird Rule."

Riverside Bayview Homes, Inc., owned 80 acres of lowlying marshland near the shores of Lake St. Clair in Macomb County, Michigan. When Riverside Bayview Homes placed fill material on the property without a permit, the Corps

asserted jurisdiction over the property as an "adjacent wetland" and obtained an injunction from the district court. The district court found that the marshland was adjacent to a navigable water because the area was characterized by saturated soil conditions and wetland vegetation that "extended . . . to Black Creek, a navigable waterway." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

That physical side-by-side connection between the marshland and the open body of water formed the basis for this Court's decision in *Riverside Bayview Homes*. This Court expressly held that Riverside Bayview Homes must obtain a Section 404(a) permit "[b]ecause respondent's property is part of a wetland that *actually* abuts on a navigable waterway." *Id.* at 135 (emphasis added). But notwithstanding this clear holding, other language in *Riverside Bayview Homes* was interpreted by the EPA and the Corps to extend the reach of the Clean Water Act to nonnavigable waters generally, as was the case here. *See* App. A8-A10.

As this Court noted: "In *Riverside Bayview Homes* we recognized that Congress intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed "navigable" under the classical understanding of that term.'" *Solid Waste Agency*, 531 U.S. at 171 (quoting *Riverside Bayview Homes*, 474 U.S. at 133). The EPA and the Corps (not to mention the courts) used that language to justify regulation of even wholly isolated waters. But in *Solid Waste Agency*, this Court rejected that interpretation by noting that the language of *Riverside Bayview Homes* did not confer federal jurisdiction over all nonnavigable wetlands. "We cannot agree," this Court stated, "that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute," as the agencies and lower courts had done. *Id.* at 172. Although this Court said in *Riverside Bayview Homes* that the word "navigable" had "limited effect," this Court stated in *Solid Waste Agency* that "it

is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.* This Court concluded, therefore, that

> [t]he term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. at 172.

This language set forth the scope of the Clean Water Act and clarified *Riverside Bayview Homes*, an observation missed by the Sixth Circuit below. Although this Court had held in *Riverside Bayview Homes* that the term "navigable" was of limited effect, in *Solid Waste Agency* this Court declared the limits of that effect: "In *United States v. Riverside Bayview Homes, Inc.*, we held that the Corps had § 404(a) jurisdiction over wetlands that *actually abutted* on a navigable waterway." *Id.* at 167 (emphasis added; citations omitted).

But this Court did not stop there in its explication of *Riverside Bayview Homes*. This Court offered additional clarification of that decision and the scope of agency jurisdiction over wetlands. This Court stated: "But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands *adjacent* to navigable waters." *Id.* (emphasis added). And further, "[w]e found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands '*inseparably bound up* with the "waters" of the United States.'" *Id.* (emphasis added) (quoting *Riverside Bayview Homes*, 474 U.S. at 134). Thus, "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* (emphasis added).

This Court defined jurisdictional wetlands in *Riverside Bayview Homes*, therefore, as those wetlands "that actually abutted on a navigable waterway" *and* were "inseparably bound up with the 'waters of the United States.'" These two factors comprised the "significant nexus" which informed this Court's reading of the Clean Water Act and constituted the basis for federal regulation of adjacent wetlands.

After discussing what this Court *had* determined in *Riverside Bayview Homes*—that the Corps could regulate certain wetlands that *abut* a "navigable waterway"—this Court pointed out what it *had not* determined in that case: "Indeed, we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are *not adjacent* to bodies of open water . . . .'" *Id.* at 167 (emphasis added).

It follows from that statement that *Riverside Bayview Homes* (on which the Sixth Circuit relied in this case) does not, and could not, provide a legal basis for the decision below upholding a criminal conviction for violating federal regulation of wetlands that lie close to twenty miles from the nearest navigable waters. Moreover, in *Solid Waste Agency* this Court addressed the very question left open in *Riverside Bayview Homes* and concluded:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 168.

This conclusion is not dicta that can be ignored as unnecessary to the decision, although the Sixth Circuit did so below. Rather, it formed the basis on which this Court invalidated the "Migratory Bird Rule" and declined the

government's invitation to hold that "isolated ponds, some only seasonal . . . fall under § 404(a)'s definition of 'navigable waters.'" *See id.* at 171.

The Sixth Circuit misapplied the statutory test for determining jurisdictional wetlands under the Clean Water Act. Rather than limit federal regulation to wetlands that actually abut navigable waters, and are inseparably bound up with those waters, as this Court requires under *Riverside Bayview Homes* and *Solid Waste Agency*, the Sixth Circuit extended federal authority to the isolated wetlands on Mr. Rapanos' property. Indeed, the district court found that *no "hydrological connection" was ever established* between the wetlands and the nearest navigable waterbody miles away.[2]

II

CONGRESS DID NOT INTEND THE BROAD READING OF THE CLEAN WATER ACT ADOPTED BY THE SIXTH CIRCUIT IN THIS CASE

The Sixth Circuit's expansive reading of the Clean Water Act to allow federal jurisdiction over the entire tributary system of any waterway, including the isolated wetlands in this case, is based on a faulty premise. In the appellate court's view,

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[2] App. B6-B8. Although the district court found that a new trial was not in order to determine the exact connection between the wetlands on Mr. Rapanos' property and navigable waters, this was based on the court's determination as a matter of law that the wetlands on Mr. Rapanos' property were not adjacent to navigable waters and could not be regulated. App. B8. If, however, this Court determines that any "hydrological connection" is sufficient to establish § 404(a) jurisdiction under the Clean Water Act, Mr. Rapanos should have the right of a new trial to determine the nature of that connection, if any at all.

"common sense makes clear" that the Clean Water Act cannot "purport to police only the navigable-in-fact waters in the United States in order to keep those waters clean from pollutants." App. A6. But this argument misses the point. Whatever the Sixth Circuit believes "common sense makes clear," Congress itself chose to limit CWA jurisdiction to traditional navigable waters. This Court makes clear that Congress did not intend the broad reading of the Act adopted by the Sixth Circuit:

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92-1236, p. 144 (1972), neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation . . . .

Solid Waste Agency, 531 U.S. at 168 n.3.

Moreover, this Court explained its often misunderstood statement in *Riverside Bayview Homes* that the word "navigable waters" in the statute was of "limited effect." *Id.* at 172. "[I]t is one thing," this Court said, "to give a word limited effect and quite another to give it no effect whatever." *Id.* This Court concluded, therefore, that the term "navigable waters" in the Clean Water Act shows "us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or have been navigable in fact or which could reasonably be so made." *Id.*

The decision of Congress to limit the scope of the Clean Water Act to "navigable waters" is not contrary to "common sense." Rather, it makes perfect sense. Congress understood

that it was constrained by the limits of the commerce power and the principles of federalism, so it deferred to the States to regulate nonnavigable waters.

Although Congress passed the CWA to protect the integrity of the Nations' waters, this Court found: "In so doing, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'" *Id.* at 166-67.

Contrary to the claims of the Sixth Circuit that Congress can only protect "navigable waters" by "policing" nonnavigable waters, like the isolated wetlands in this case, the government can enforce § 404(a) against anyone who actually discharges a pollutant to a "navigable water" without directly regulating other waters or sources of pollution. *See United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (Defendant convicted of CWA violation when upland oil pipeline ruptured, spilled on dry land, and leaked into nearby Skagway River, a navigable water). The simple truth is that the government need not regulate all sources of pollution with a potential "hydrological connection" to "navigable waters" to effectuate the purpose of the Act; to protect the "physical and biological integrity of the Nation's waters." 531 U.S. at 166. The substantial civil and criminal penalties imposed by the Act serve as a deterrent to unauthorized discharges. *See* 33 U.S.C. § 1319.

Also, if Congress can directly regulate anything that could adversely affect what Congress statutorily protects, Congress could extend its powers beyond those enumerated in the Constitution without limit. The danger in this is demonstrated by this case. According to the Sixth Circuit, "A pollutant can contaminate non-navigable water and pollute the navigable-in-fact waters downstream." App. A6. Therefore, the Sixth

Circuit believes, Congress must have intended to regulate nonnavigable waters. But the fallacy in this is that logically the same thing could be said of dry land too: A pollutant can contaminate dry land and pollute the navigable-in-fact waters downstream. *See, e.g., Hanousek*, 176 F.3d 1116.

The Clean Water Act does not purport to regulate dry land any more than it purports to regulate isolated waters, like the wetlands on Mr. Rapanos' property. Congress surely would have been explicit had it intended such broad regulatory authority to address pollution from such sources far removed from any navigable water. As this Court observed in *Solid Waste Agency*, "we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here." *Solid Waste Agency*, 531 U.S. at 174.

III

THE SIXTH CIRCUIT DECISION IN THIS CASE CONFLICTS WITH THE FIFTH CIRCUIT ON A QUESTION OF NATIONAL IMPORTANCE

Since this Court's decision in *Solid Waste Agency*, the government has routinely argued that this Court merely invalidated the "Migratory Bird Rule" and did not prohibit the Corps and EPA from regulating nonnavigable, isolated, intrastate wetlands that do not abut a navigable waterway, such as the wetlands found on Mr. Rapanos' property. *See United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652. More precisely, the government has argued, as it did in this case, that the government has § 404(a) jurisdiction over any wetland, or other water, that has any "surface hydrological connection" to a navigable water, even if that water lies miles away.

That position is contrary to this Court's finding in *Solid Waste Agency* that "the text of the statute will not allow" Clean

Water Act jurisdiction over wetlands that are not immediately adjacent to navigable waters. *See Solid Waste Agency*, 531 U.S. at 168. It is no surprise, therefore, that such cases have led to a substantial conflict among the district courts as well as a conflict among the Circuit Courts of Appeal. The Fifth Circuit decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and *In Re Needham*, WL 22953383 (5th Cir. 2003) conflict with the Sixth Circuit's decision in this case.

In *Rice*, an action was brought against Harken Exploration Company under the Oil Pollution Act (OPA) for oil spills on Rice's property in Hutchinson County, Texas. Among other things, the OPA imposes strict liability on parties responsible for discharging oil into "navigable waters," defined as "waters of the United States." *Id.* at 266-67. The scope of the OPA was an issue of first impression for the Fifth Circuit and required the court to define "navigable waters." *Id.* at 267.

Because there have been few cases construing the OPA definition of "navigable waters," the court turned to the cases interpreting the term "navigable waters" under the Clean Water Act. The Fifth Circuit determined that the legislative history and the use of identical definitions of "navigable waters" in the OPA and the Clean Water Act suggested that Congress intended the term "navigable waters" to "have the same meaning" in both acts. *Id.*

The Fifth Circuit began its analysis with a reference to *Riverside Bayview Homes* in which it noted that this Court had adopted an expansive reading of "navigable waters" which the Fifth Circuit had previously followed in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). *Rice v. Harken*, 250 F.3d at 268. But the court concluded its analysis with *Solid Waste Agency,* noting that this Court had more recently "limited the scope of the CWA." *Id.*

The Fifth Circuit observed that in *Solid Waste Agency*, this Court had "distinguished *Riverside Bayview Homes* on the

ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable" and that the term "navigable waters" had to have some effect. *Id.* Based on its reading of *Solid Waste Agency*, therefore, the Fifth Circuit declined to characterize a small seasonal creek as "waters of the United States" subject to federal regulation under either the Clean Water Act or the OPA, even though the creek flowed intermittently into the Canadian River, a "navigable water." "Instead," the court held, "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." *Id.* at 270.

More recently, the Fifth Circuit affirmed its holding in *Rice* and expressly rejected the Sixth Circuit's interpretation of Clean Water Act jurisdiction in this case. In *In re Needham*, WL 2295338, the Fifth Circuit was again required to determine the scope of "navigable waters" under the Oil Pollution Act and, as in *Rice*, the Fifth Circuit relied on *Solid Waste Agency* for its determination.

In *In Re Needham*, the government argued that the definition of navigable waters "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at *3. The Fifth Circuit noted that at least two appellate courts had agreed with this interpretation: *United States v. Deaton*, 332 F.3d 698 ("asserting authority under the CWA, over wetlands that are 'adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay'"); and the Sixth Circuit in this case, App. A10 ("asserting authority, under the CWA, over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river.") *In Re Needham*, WL 22953383 at *3.

But the Fifth Circuit expressly rejected this interpretation, stating that the government's definition of navigable waters "is unsustainable" under *Solid Waste Agency*. *Id.* According to the

court, the CWA and OPA do not permit the federal government to regulate "tributaries," including wetlands, that are neither navigable in fact nor adjacent to such waters. *Id.*

> Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under [*Solid Waste Agency*] "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *In Re Needham*, WL 22953383, *id.* citing *Rice*, 250 F.3d at 269.

The Fifth Circuit court went on to say that the interpretation of "navigable waters" suggested by the government—which the court previously noted had been adopted by the Sixth Circuit in this case—would push "the outer limits of the Commerce Clause and raise serious constitutional questions." *In Re Needham*, WL 22953383 at *5, n.8.

The Fifth Circuit decisions in *Rice* and *In Re Needham* not only conflict with the Sixth Circuit decision in this case, but also with the Fourth Circuit decisions in *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), and *United States v. Deaton*, 332 F.3d 698, both of which are pending before this Court on petitions for writ of certiorari. *See Newdunn v. United States* (Docket No. 03-637) and *Deaton v. United States* (Docket No. 03-701). And, like Mr. Rapanos in this case, both *Newdunn* and *Deaton* raise this conflict and a similar question of whether the government can regulate wetlands that are not immediately adjacent to a navigable water.

IV

THE DECISION BELOW NOT ONLY EXCEEDS THE STATUTORY AUTHORITY OF THE CLEAN WATER ACT, IT ALSO RAISES SERIOUS CONSTITUTIONAL QUESTIONS ABOUT WHICH THIS COURT WARNED IN *SOLID WASTE AGENCY*

In *Solid Waste Agency*, this Court instructed that the word "navigable" must inform the government's interpretation of the jurisdictional reach of the Clean Water Act. Otherwise, "the use of the word navigable in the statute . . . does not have any independent significance." *Solid Waste Agency*, 531 U.S. at 172. According to this Court, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*

Besides the express language in the Act, this Court gave three reasons for limiting Corps' authority to Congress' traditional jurisdiction over navigable waters and refusing to hold, as the government urged, "that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171-72. First, the regulation of such waters raised serious Commerce Clause problems. Second, it upset the federal-state balance. And third, the regulation of such waters undermined the express objective of the Clean Water Act to protect the ability of the states to control local land and water use.

Thus, any regulation of a wetland that does not satisfy this Court's concerns, cannot be sustained. In this case, the government's assertion of regulatory authority over nonnavigable, isolated, intrastate wetlands raises the same constitutional and statutory problems as the Corps' regulation

of the nonnavigable, isolated, intrastate waters this Court invalidated in *Solid Waste* Agency.

A. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Raises a Serious Question of Congress' Power Under the Commerce Clause

In *Solid Waste Agency*, the Corps argued that the Clean Water Act granted it authority to regulate "nonnavigable, isolated, intrastate" waters. *Id.* at 172. However, the Supreme Court determined that the Corps' interpretation of the statute invoked "the outer limits of Congress' power" and could not be sustained. *Id.*

> Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

Id. at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988)).

The constitutional problem was the Corps' claim that the filling of "nonnavigable, isolated, intrastate" waters somehow "substantially affected" interstate commerce and was, therefore, authorized under Congress' commerce power. This Court was clearly skeptical of this argument and noted that the commerce connection asserted by the Corps was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. To drive the point home, this Court referenced its Commerce Clause decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), stating: "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce

Clause, though broad, is not unlimited." *Solid Waste Agency*, 531 U.S. at 173.

Since the regulation of nonnavigable, isolated, intrastate waters implied unlimited administrative authority in the Corps, well beyond the power of Congress to regulate, this Court was unwilling to read such authority into the Clean Water Act. But the Corps' assertion of authority over all waters with a mere surface connection to a navigable water in this case implies the same limitless power as the "Migratory Bird Rule" and is likewise invalid.

In *Lopez* and *Morrison*, this Court asked: (1) if the statute purports to regulate an economic activity; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; and (3) if the regulation intrudes on areas of traditional state concern.

Under this framework, the regulation of the filling of nonnavigable, isolated, intrastate wetlands utterly fails as a valid exercise of the Commerce Clause power. First, the filling of such waters is not inherently commercial and, like the mere possession of a gun in *Lopez*, on its face has nothing to do with commerce or any sort of economic activity. Second, the government's regulation has no jurisdictional element establishing through case-by-case analysis a connection to interstate commerce. And, third, the regulation of the filling of nonnavigable, isolated, intrastate wetlands and similar waters intrudes on the sovereign power of the state to control local land and water use.

To avoid the constitutional conflict raised by the government's regulation of nonnavigable, isolated, intrastate wetlands in this case, this Court should grant the writ of certiorari and strictly apply the principles enunciated in *Solid Waste Agency* limiting the scope of the Clean Water Act to navigable waters and wetlands adjacent to such waters.

B. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Upsets the Federal-State Balance

The Corps' regulation of nonnavigable, isolated, intrastate waters in *Solid Waste Agency* raised another red flag in this Court; federal intrusion into state affairs. The concern raised by pushing the envelope on federal authority is heightened, this Court said, "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency*, 531 U.S. at 173. Simply stated, this Court recognized that permitting the Corps to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

This Court did not need to speculate on that point. The Corps' heavy-handed enforcement of § 404(a) of the Clean Water Act is well known. *See, e.g., National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (government argued that "incidental fallback" from dredging constitutes fill and that the Corps could require a permit to ride a bicycle across a wetland under its interpretation of § 404."), and *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (Wilson sentenced to 21 months in prison, 1 year supervised release and $1 million in fines for filling nonadjacent wetlands that drain to ditches, intermittent streams and creeks. Other defendants fined $3 million and placed on 5 years probation.).

By means of the § 404(a) permit process, the federal government assumes actual veto power over literally tens of thousands of land use projects nationwide every year, thereby usurping the traditional powers of state and local governments. A more significant shift in the federal-state framework would be hard to conceive. By one measure, 75% of the approximately 100,000,000 acres of the nation's wetlands are

on private land subject to state and local control. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 26, 52 (1999). Clearly, this Court's concern for federal intrusion into state affairs was justified in *Solid Waste Agency* and is equally justified in this case. If the federal government can regulate nonnavigable, isolated, intrastate wetlands, as it did in this case, or any wetland with a mere hydrological connection to a navigable water, the States will have lost much of their sovereign power. This cannot be the law.

This Court has recognized that the Constitution established a federal government of enumerated powers which are few and defined in contrast to the powers of the States which are numerous and indefinite. *See Lopez*, 514 U.S. at 552. This limitation on federal authority was necessary, this Court has emphasized, to ensure our fundamental liberties and protect the nation against unfettered federal power and a "completely centralized government." *Id.* at 552-55. It follows, therefore, that the federal government cannot shift this balance of power by the simple expedient of asserting regulatory authority over virtually all intrastate wetlands, as it has done in this case.

In *Solid Waste Agency* this Court affirmed the principle that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." 531 U.S. at 172. This principle derives, this Court said, from the "prudential desire not to needlessly reach constitutional issues" and the Court's assumption that Congress does not lightly authorize statutory interpretations that "push the limit of congressional authority" as the Corps had done in *Solid Waste Agency*. *Id.* 172-73. Thus, this Court stated, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly

contrary to the intent of Congress." *Id.* at 173 (citing *DeBartolo*, 485 U.S. at 575).

C. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Undermines an Express Objective of the Clean Water Act to Defer to the Rights of the States

Congress understood the dangers of upsetting the federal-state balance and sought to protect state and local governments from federal overreaching. Indeed, Congress expressly forbade the all-encompassing federal regulation of intrastate waters that is the common practice of the Corps and EPA today and which the Sixth Circuit upheld in the decision below.

An explicit objective of Congress in promulgating the Clean Water Act was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). But the regulation of nonnavigable, isolated, intrastate waters at issue in *Solid Waste Agency* was inconsistent with that objective. So is the regulation of nonnavigable, isolated, intrastate wetlands in this case. The ability of the federal government to condition or prohibit the filling of nonadjacent waters cannot coexist with the State's "primary responsibilities and rights . . . to plan the development and use . . . of land and water resources" recognized by Congress in the Clean Water Act. *Id.* The regulation of such waters does not "recognize, preserve, and protect" the power of the States. Rather, it diminishes that power.

Therefore, the government's regulation of the wetlands on Mr. Rapanos' property is not sanctioned by Congress, nor is it supported by the Constitution or the constitutional structure. Therefore, this Court should grant the writ, apply *Solid Waste Agency*, and "read the statute as written to avoid the significant constitutional and federalism questions raised" by this case. *Solid Waste Agency*, 531 U.S. at 174.

CONCLUSION

The criminal conviction of Mr. Rapanos in the Sixth Circuit for placing sand on isolated wetlands that lie approximately twenty miles from the nearest navigable waters defies common sense. It also conflicts with this Court's decision in *Solid Waste Agency* and the Fifth Circuit's decisions in *Rice* and *In Re Needham*. To justify Clean Water Act jurisdiction, those cases require that a wetland abut, and be inseparably bound up with, a navigable water. In addition, federal regulation of Mr. Rapanos' wetlands under the Clean Water Act is inconsistent with the Constitution, the intent of Congress, and established principles of federalism.

This Court should grant the writ of certiorari.

DATED: December, 2003.

Respectfully submitted,

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Appendix A1

No. 02-1377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	Argued
	)	June 18, 2003
Plaintiff-Appellant,	)	Decided and Filed
	)	Aug. 5, 2003
v.	)	
	)	
JOHN A. RAPANOS,	)	
	)	
Defendant-Appellee.	)	

* * * *

Before: MARTIN, Chief Circuit Judge; NORRIS and ROGERS, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge.

This case arises from the criminal conviction of John Rapanos for unlawfully filling wetlands in Michigan in violation of the Clean Water Act, 33 U.S.C. § 1311(a). After the conviction, an appeal, a denial of *certiorari*, a second appeal, and a grant of *certiorari*, the Supreme Court remanded the case back to us to review in light of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576 (2001). We remanded the case to the district court. The district court found that, in light of *Solid Waste*, Rapanos's land was outside the jurisdiction of the Clean Water Act and the charges were dismissed. The

United States now appeals this decision. For the reasons below, we REVERSE the judgment of the district court and REINSTATE the convictions.

John Rapanos owns a one hundred and seventy-five-acre plot of land in Williams Township, Bay County, Michigan. This plot once contained forested wetlands and cleared meadow areas. During the course of this proceeding, the wetlands in question have been described as between eleven and twenty miles from the nearest navigable-in-fact water. The government argues that there is a significant and direct link between the wetlands on Rapanos's land and this navigable waterway, rendering the wetlands covered by the Clean Water Act. The wetlands are connected to the Labozinski Drain (a one hundred year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin eventually flows into Saginaw Bay and Lake Huron.

At some unstated time, Rapanos decided to sell this plot of land to developers, but in order to make the land more attractive, Rapanos made plans beginning in 1988 to clear the trees from the land and to eradicate the wetlands that were on the property. In December of 1988, Rapanos's attorney approached the Michigan Department of Natural Resources with the development plan. The Department informed him that the land contained wetlands and a permit would be necessary for development to begin on the area, advising that a wetlands consultant be hired to help Rapanos get the permit. Rapanos hired a consultant, who found at least forty-nine and at most fifty-nine acres of wetlands. After receiving the report, Rapanos asked the consultant to destroy any paper evidence of the wetlands on his property and then threatened to fire him and sue if he did not comply. Despite warnings from the Michigan Department of Natural Resources and the United States Environmental Protection Agency, Rapanos began destroying

the wetlands on his property by filling them with earth and sand.

On November 7, 1989, a search warrant was issued, and the executing officers found twenty-nine acres of wetlands on Rapanos's property. In April of 1991, the Michigan Department of Natural Resources asked the United States Environmental Protection Agency to intervene and force compliance from Rapanos. The facts established at trial that Rapanos and his attorney lied in response to the compliance order. Subsequently, Rapanos was charged with knowingly discharging pollutants into the waters of the United States without a permit, a violation of the Clean Water Act. While acknowledging that the wetlands were destroyed, Rapanos argues that the area is not subject to the Clean Water Act because of a lack of federal jurisdiction. He argues the wetlands on his property are not part of the "waters of the United States" as required by the Act. The Act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7).

Rapanos's first trial ended in a mistrial, and the second trial concluded with a guilty verdict. *United States v. Rapanos*, 895 F.Supp. 165, 166 (E.D.Mich.1995). Rapanos then filed a motion for judgment of acquittal and a new trial. The district court denied the motion for judgment of acquittal but granted a new trial. *Id.* at 170. The district court found that, although defense counsel did not object to certain questioning by the prosecution, the court committed plain error by permitting the questioning to proceed. *Id.* at 168. On appeal to this court, we held that the line of questioning was not improper and, therefore, the district court did not commit plain error. We reversed the court's grant of a new trial and remanded for sentencing. *United States v. Rapanos*, 115 F.3d 367, 374 (6th Cir.1997).

The district court sentenced Rapanos to three years of probation and ordered him to pay $185,000. He appealed his conviction, and the United States cross-appealed his sentence. This court affirmed Rapanos's conviction on direct appeal but remanded to the district court for resentencing. *United States v. Rapanos*, 235 F.3d 256, 261 (6th Cir. 2000). Rapanos filed a petition for writ of *certiorari*, which the Supreme Court granted. The order granting the writ vacated this court's judgment and remanded the case to us for further consideration in light of *Solid Waste*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576. *Rapanos v. United States*, 533 U.S. 913, 121 S. Ct. 2518, 150 L.Ed.2d 691 (2001). We remanded the case to the district court for consideration in light of *Solid Waste*. *United States v. Rapanos*, 16 Fed.Appx. 345 (6th Cir. 2001). On remand, the district court set aside Rapanos's convictions and dismissed the case, finding that *Solid Waste* had changed the scope of federal jurisdiction under the Clean Water Act. The district court found that because the wetlands on Rapanos's property were not "directly adjacent to navigable waters," the government could not regulate them. *United States v. Rapanos*, 190 F. Supp.2d 1011, 1015-16 (E. D. Mich.2002). The United States appealed this order, which brings this case before us now.

We review the district court's statutory and legal interpretations *de novo*. *United States v. Markwood*, 48 F.3d 969, 975 (6th Cir. 1995). The two questions at issue are whether the district court correctly interpreted the holding of *Solid Waste* and applied it to the facts of this case and whether the original jury instructions were correct in light of *Solid Waste*.

The controversy in *Solid Waste* arose from a group of Chicago suburbs' efforts to find new landfill areas. 531 U.S. at 162-63, 121 S. Ct. 675. They targeted land that had been a sand and gravel mining area from the late 1920's until 1960. *Id.* at

163, 121 S. Ct. 675. Once the mining operation was abandoned, a forest began to take over, and some of the excavation areas collected enough water to become permanent and seasonal ponds. *Id.* When the suburbs wanted to use the land for landfill, the United States Army Corps of Engineers objected to this destruction of "waters of the United States." *Id.* at 164, 121 S. Ct. 675. The non-navigable and isolated ponds were given this designation because the ponds had become the home of migratory birds; the Corps had recently promulgated the "Migratory Bird Rule," which brought waters that were home to migratory birds under federal jurisdiction, based on the principle that "millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds." *Id.* at 166, 121 S. Ct. 675. In *Solid Waste*, however, the Supreme Court rejected that basis for Clean Water Act jurisdiction and ruled that the Migratory Bird Rule exceeded the limitations of the Clean Water Act. *Id.* at 174, 121 S. Ct. 675. The ponds were, therefore, not "waters of the United States," and the group of suburbs was allowed to develop the land without federal interference. *Id.*

The primary question in the case before us is one of jurisdiction. Rapanos claims that *Solid Waste* has redefined the jurisdiction of the Clean Water Act to such a degree that his land is no longer under the Act's protection. We must first turn to the Act itself. The Clean Water Act prohibits the "discharge of any pollutant by any person" except for certain situations enumerated in the Act itself. 33 U.S.C. § 1311(a). One of the exceptions is that a permit must be issued by the Corps of Engineers "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). "Navigable waters" is in turn defined as "waters of the United States, including territorial seas," 33 U.S.C. § 1362(7), and the Supreme Court has noted that "Congress chose to define waters covered by the Act broadly" in that definition. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121,

133, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985). Although simple in theory, the application of "waters of the United States" has been anything but straightforward.

As common sense makes clear, the Clean Water Act cannot purport to police only the navigable-in-fact waters in the United States in order to keep those waters clean from pollutants. A pollutant can contaminate non-navigable water and pollute the navigable-in-fact waters downstream. Congress acknowledged this reality when it created the Clean Water Act, stating, "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." S.Rep. No. 92-414, at 77 (1972), U.S. Code Cong. & Admin. News 3668. As *Solid Waste* makes clear, however, the need to protect the navigable waters from pollution, as the Clean Water Act intends, does not require extending the federal government's jurisdiction over all non-navigable waters.

Wetlands have presented one of the most difficult areas in which to determine the Clean Water Act's exact jurisdictional limitations. Although wetlands are not traditionally navigable-in-fact, they play an important ecological role where they exist. In 40 C.F.R. § 230.3(s), the regulation specifies protection for wetlands that

> affect interstate or foreign commerce . . . [,][w]hich are or could be used by interstate or foreign travelers for recreational or other purposes . . . [,][f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce [, and] [w]hich are or could be used for industrial purposes by industries in interstate commerce.

Additionally, the regulation specifies coverage for "[w]etlands adjacent to waters" listed above. *Id.* Essentially, any wetlands

adjacent to waters that are protected by the Clean Water Act are also protected. *Id.*

The Supreme Court first addressed this question of the applicability of the Clean Water Act to wetlands in *Riverside Bayview*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419, a case originally from this circuit. In that case, a landowner wished to develop his wetlands area for a housing development. *Id.* at 124, 106 S. Ct. 455. The wetlands were located in close proximity to Lake St. Clair, Michigan, a navigable-in-fact body of water. *Id.* The Court held that non-navigable wetlands, if adjacent to navigable water, are under the jurisdiction of the Clean Water Act. *Id.* at 131, 106 S. Ct. 455. The Court recognized that the next question before them was whether "the [Corps' definition of wetlands] itself is valid as a construction of the term 'waters of the United States.'" *Id.* The Court noted that "Congress chose to define the waters covered by the Act broadly . . . . [T]he term 'navigable' . . . is of limited import." *Id.* at 133, 106 S. Ct. 455. The Court ultimately held that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135, 106 S. Ct. 455. In the post-*Riverside* jurisprudence, however, the question remains as to how far the jurisdiction may go and remain a "permissible interpretation."

The Supreme Court's most recent exploration of the extent of Clean Water Act jurisdiction comes in *Solid Waste*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576. In that case, the Court recognized that constitutional limits exist as to how far Congress can extend the Clean Water Act's coverage beyond navigable-in-fact waters. In *Solid Waste*, the water in question was in permanent and seasonal ponds with no hydrological connection to other waterways. *Id.* at 163, 121 S. Ct. 675. The United States claimed federal jurisdiction over the ponds through the "Migratory Bird Rule." 51 Fed.Reg. 41217 (Nov.

13, 1986) (was codified at 33 C.F.R. § 328.3). The Court ruled that the Migratory Bird Rule "exceeds the authority granted to the respondents under § 404(a) of the [Clean Water Act]." *Solid Waste*, 531 U.S. at 174, 121 S. Ct. 675.

Here, Rapanos successfully argued to the district court that *Solid Waste* drastically changed the scope of power granted by the Clean Water Act. In support of his argument, Rapanos turns to Chief Justice Rehnquist's frequent use in the majority opinion of the phrase "wetlands adjacent to water." Rapanos argues that by the use of this phrasing, the Court required that wetlands be *directly* adjacent to navigable water in order for the wetlands to be covered by the Clean Water Act. Although the wetlands were incidentally directly adjacent to navigable-in-fact water in *Riverside*, this interpretation would mark a stark departure from the broad interpretation of the Clean Water Act's scope expressed by the Court in that case. *See Riverside*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419.

Riverside Bayview established that it was a reasonable application of the Clean Water Act to protect wetlands "adjacent to" navigable waterways. 474 U.S. at 135, 106 S. Ct. 455. *Solid Waste* stated that the Migratory Bird Rule was an unreasonable application of the Clean Water Act. 531 U.S. at 174, 121 S. Ct. 675.

This case is closer to *Riverside Bayview* than to *Solid Waste*. In drawing this conclusion, we find persuasive the Fourth Circuit's recent decision in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). In *Deaton*, the defendants were charged under the same statute as Rapanos. *Id.* at 701. In a further similarity, *Deaton* involved wetlands that drain into a ditch which must pass through other waterways to get to navigable-in- fact water, just as is the case on Rapanos's land. *Id.* at 702. The Fourth Circuit analyzed the situation in light of

the Supreme Court's decision in *Solid Waste* and held, *id.* at 709 (citations omitted), that

> [*Solid Waste*], of course, emphasizes that the [Clean Water Act] is based on Congress' power over navigable waters, suggesting that covered non-navigable waters are those with some connection to navigable ones. But we cannot tell from the Act the extent to which nonnavigable tributaries are covered. The statutory term "waters of the United States" is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by [*Solid Waste*].

The court further stated, *id.* at 712 (citations omitted),

> In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what [*Solid Waste*] described as "the significant nexus between the wetlands and 'navigable waters.'" There is also a nexus between a navigable waterway and its nonnavigable tributaries . . . . This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.

Because we find the Fourth Circuit's reasoning persuasive, we disagree with the broad interpretation of *Solid Waste* taken by the district court in this case, *Rapanos*, 190 F.Supp.2d at 1016, and, instead, agree with *Deaton*, 332 F.3d 698 at 708-9. Although the *Solid Waste* opinion limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act's coverage to only wetlands directly abutting navigable water. Instead, the *Solid Waste* Court, in a narrow holding, invalidated the Migratory Bird Rule as exceeding the authority granted to the Army Corps of Engineers by the Clean Water Act, because it found "nothing approaching a clear statement from Congress that it intended [the Act] to reach an abandoned sand and gravel pit." *Solid Waste*, 531 U.S. at 174, 121 S. Ct. 675.

The evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that the Rapanos wetlands are covered by the Clean Water Act. Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act. *Solid Waste* requires a "significant nexus between the wetlands and 'navigable waters,'" 531 U.S. at 167, 121 S. Ct. 675, for there to be jurisdiction under the Clean Water Act. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction. *Riverside Bayview*, 474 U.S. at 133, 106 S. Ct. 455.

We now turn to the second question before us, regarding the disputed jury instruction. The instruction reads as follows:

> The term waters of the United States includes waters such as lakes, rivers, streams, including intermittent streams or wetlands. The use, degradation, or destruction of, which could affect interstate or foreign commerce, including any such water from which fish or shellfish are or could be taken and sold in interstate commerce.
>
> The definition of waters of the United States also includes tributaries of the waters . . . just identified, and wetlands adjacent to waters of the United States.

Rapanos did not object to the jury instruction; in fact, he specifically requested them. Our review of the instruction is therefore for plain error. Fed R.Crim. P. 52(b). We have stated in *United States v. Jones*, 108 F.3d 668, 670 (6th Cir.1997) (citations omitted), that

> [O]ur inquiry under Rule 52(b) consists of the following four distinct, though interrelated, analyses: (1) whether an error occurred in the district court; (2) if error occurred, whether the error was plain; (3) if the error was plain, whether the plain error affected substantial rights; and (4) "even if all three factors exist, we must then consider whether to exercise our discretionary power under Rule 52(b), or in other words, we must decide whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings."

In this case, we need only go so far as the first part of the Rule 52(b) inquiry as set forth in *Jones*. Because the *Solid Waste* holding was limited in the way we have described, there was no error in the jury instructions. *Solid Waste* invalidated the "Migratory Bird Rule" but it did not invalidate the agency's

regulations upon which the jury instruction was based. *See* 33 C.F.R. § 328.3(a)(3).

Moreover, even if the jury instruction could be interpreted to have permitted the jury to find that the wetlands at issue were covered because the "affect commerce" language somehow permits an inference like that rejected in *Solid Waste*, there is no indication that such an error affected substantial rights in this case. There was no evidence of migratory bird activity in Rapanos's wetlands. Therefore, the jury could not have based its decision on impermissible grounds, and Rapanos's substantial rights could not have been affected.

For the foregoing reasons, we REVERSE the decision of the district court and REINSTATE the conviction. 28 U.S.C. § 2106. In light of our previous ruling, the case is hereby REMANDED to the district court for resentencing based on a total offense level of twelve. *See Rapanos*, 235 F.3d at 261.

Appendix B1

No. 93-CR-20023-01

UNITED STATES DISTRICT COURT
E.D. MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Filed Feb. 21, 2002
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN A. RAPANOS,	)	
	)	
Defendant.	)	

* * * *

OPINION AND ORDER

ZATKOFF, Chief Judge.

I. INTRODUCTION

This matter is before the Court on remand from the United States Supreme Court, and the United States Court of Appeals for the Sixth Circuit. The Court ordered the parties to submit briefs on the following issues: 1) to what extent, if any, is 33 U.S.C. § 1344(a) implicated in this case? 2) is Congress' authority under the relevant provisions of the Clean Water Act involved in this case consistent with the Commerce Clause of the United States Constitution? and 3) what is the import of the remand order from the United States Supreme Court? The parties have fully briefed the Court on these issues. Upon reviewing the briefs, the Court further ordered the parties to brief the Court on the following issue: whether the wetlands on

Defendant's property were directly adjacent to navigable waters? Again, the parties fully briefed the Court. The parties also submitted stipulated exhibits from the trial, and the government submitted a supplemental brief. The Court finds that the parties have adequately set forth the relevant law and facts, and that oral argument would not aid in the disposition of this case on remand. *See* E.D.MICH.L.R. 7.1(e)(2). Accordingly, the Court ORDERS that this case on remand be decided on the briefs submitted. For the reasons stated below, the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property. Therefore, Defendant's conviction is set aside, and this case is DISMISSED.

II. BACKGROUND

This case has been remanded to this Court from the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit for reconsideration in light of the Supreme Court's opinion in *Solid Waste Agency of No. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576 (2001). The Court shall provide sufficient background facts in order to decide the remand order from the Supreme Court.

Defendant owns a 175 acre plot of land located in Williams Township, Michigan. Defendant's property is not directly adjacent to a navigable body of water; it is over twenty miles from Saginaw Bay, and it roughly twenty miles from where the Kawkawlin River—the nearest body of navigable water—becomes navigable. That 175 acre plot of land contained wetlands. At no time did the wetlands ever occupy more than one-third of Defendant's land, and usually occupied less. Like Defendant's property itself, the wetlands were not directly adjacent to either the Saginaw Bay or the Kawkawlin River.

Appendix B3

Defendant wanted to sell his property to a developer who planned on developing the property. In order to make the land more enticing, Defendant cleared the heavily wooded plot, and filled the wetlands—which were located entirely within his own property—with sand. He did not have the appropriate permit to do so. Thereafter, the government prosecuted Defendant for filling the wetlands with sand while failing to obtain the proper permit.

Defendant was originally brought to trial in July 1994, but due to scheduling concerns, a new trial was ordered. Defendant's second trial commenced in February 1995, and ended in March with a jury convicting Defendant of two counts of knowingly discharging pollutants into waters of the United States without a permit, in violation of § 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter "Clean Water Act" or "CWA"). *See* 33 U.S.C. § 1311(a).

After the trial, upon Defendant's motion, the Court reviewed the course of the trial, and ordered a new trial due to a cross-examination of Defendant by the government regarding Defendant's refusal to allow a search of his property. The Court of Appeals reversed, holding that the Court's order was an abuse of discretion.[1] *See United States v. Rapanos*, 115 F.3d

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[1] Defendant did not allow officials from the Michigan Department of Natural Resources to inspect his property. *See Rapanos*, 115 F.3d at 369. At trial, the government cross-examined Defendant about this refusal. *See id.* After the trial, the Court declared a mistrial because it found that Defendant had a right under the Fourth Amendment to deny such an inspection, and that it was improper for the government to cross-examine him about exercising his right. *See id.* at 371. Over a vigorous dissent, the Sixth Circuit reversed, holding that because Defendant's property was an open field he did not have an expectation of privacy that implicated the Fourth Amendment. *See id.* at 374. Therefore, the cross-examination was

(continued...)

367, 374 (6th Cir.1997). On remand, the Court sentenced Defendant to three years' probation and a fine of $185,000. Defendant appealed his conviction, and the government cross-appealed his sentence. The Court of Appeals held that this Court improperly sentenced Defendant and remanded the case for resentencing, while at the same time summarily dismissing Defendant's appeal. *See United States v. Rapanos*, 235 F.3d 256, 261 (6th Cir. 2000). Defendant sought a writ of certiorari from the United States Supreme Court. The Supreme Court granted the writ, vacated the Court of Appeals' order, and remanded the case to the Court of Appeals, instructing the Court of Appeals to reconsider the case in light of *Solid Waste Agency*. The Court of Appeals remanded the case to this Court. *See United States v. Rapanos*, 16 Fed.Appx. 345 (6th Cir. 2001).

III. ANALYSIS

Defendant was convicted of violating the Clean Water Act. Congress passed the CWA for the purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *See* 33 U.S.C. § 1251(a). The CWA was enacted because the Federal Water Pollution Control Act, which was passed in 1948, proved to be ineffective. *See Environmental Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202, 96 S. Ct. 2022, 48 L.Ed.2d 578 (1976). Congress determined that part of the reason the Federal Water Pollution Control Act failed was because it "focused on the tolerable effects rather the preventable causes of water pollution." *Id.* One way Congress chose to curtail the causes of water pollution was by broadly defining the term

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[1] (...continued)
not improper. *See id.* at 374.

"navigable waters." *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-34, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985); *see also United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974). The definition of "navigable waters" is central to this case.

The CWA defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). The phrase "navigable waters" is used in the statute that governs this case: § 404 of the CWA, which is codified as 33 U.S.C. § 1344. The CWA makes unlawful "the discharge of any pollutant [including sand, *see* 33 U.S.C. § 1362(6)] by any person," except as in compliance with "section[ ] . . . 404 of this title." 33 U.S.C. § 1311(a). Section 404 provides that a person may discharge fill material into "navigable waters" in order to "bring[ ] an area of . . . navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). Before a person may do so, however, that person must obtain a permit from the Secretary of the Army, acting through the Army Corps of Engineers.[2] *See* 33 U.S.C. § 1344.

The government argues that the wetlands at issue here fall within the scope of § 404 because they constitute "waters of the United States." Regulations promulgated by the Army Corps of Engineers define "waters of the United States" as including: "All other waters such as . . . wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." 33 C.F.R. § 328.3. The regulations also consider tributaries of navigable waters and wetlands adjacent to navigable waters as falling within the definition of "waters of the United States." *See* 33 C.F.R. § 328.3(5),(7). The government argues that the wetlands on Defendant's 175 acre property were "waters of the United States" because they

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[2] The Army Corps of Engineers has been charged since 1899 with the protection of the navigable waters of the United States.

constituted a "tributary." The government argues that there was evidence introduced at trial that demonstrates that the wetlands at issue were "hydrologically connected and 'directly adjacent to navigable waters.'"[3]

The government is correct in noting that evidence was introduced at trial supporting its position that the wetlands on Defendant's property were connected to navigable waters and therefore constituted "waters of the United States." That fact, however, was never explicitly found, either by the jury or by this Court, nor was such a finding necessitated by the jury instructions.[4] Instead, the jury instructions allowed the jury to find that the wetlands were completely isolated, yet had some impact on interstate commerce. The jury was instructed: "The term ["]waters of the United States["] includes waters[,] such as lakes, rivers, streams, including intermittent streams or wetlands, the use[,] degradation or destruction of which could affect interstate or foreign commerce." The jury was further instructed that the term "waters" also includes "tributaries of the waters that I've just identified, and wetlands adjacent to

---

[3] It is worth noting that the majority opinion in *Solid Waste Agency* repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hyrdologically connected, as well as ecologically connected, to navigable waters. *See Solid Waste Agency*, 531 U.S. at 176 n. 2, 121 S. Ct. 675 (Stevens, J., dissenting). The dissent notes that the wetlands in *Solid Waste Agency* are at least ecologically connected. *See id.* Despite this, the majority still refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, Defendant's wetlands may be considered "isolated" for purposes of the CWA.

[4] The jury instructions at issue were proposed by both the government and Defendant.

waters of the United States." Thus, while the jury could have found that the wetlands on Defendant's property were adjacent to a tributary, such a finding was not necessary; indeed, it is possible under these instructions that the jury found the wetlands at issue to be completely "isolated" from any navigable waters, yet still impacted interstate commerce.

These jury instructions present a problem in light of the Supreme Court's order to reconsider this case in light of *Solid Waste Agency*. There, the Supreme Court held that the Army Corps of Engineers lack the statutory authority to regulate wetlands that are completely isolated from any navigable waters. *See Solid Waste Agency*, 531 U.S. at 171, 121 S. Ct. 675 ("[R]espondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters. . . ."). Thus, whether Defendant's wetlands had any significant nexus to navigable waters is a critical fact that was left unresolved by the jury in this case. At first glance, it would appear that this Court needs to hold yet another trial in order to resolve whether Defendant's wetlands were directly adjacent to navigable waters.

Upon closer inspection of the government's proposed factual argument, it is clear that the Court does not need to hold another trial. The government argues in its brief on remand that there was evidence at trial that establishes the connection between Defendant's land and navigable water. The government argues that Defendant's wetlands had a "surface hydrological connection" to a ditch dubbed the Labozinski drain, which empties into Hoppler Creek, which eventually winds its way into the Kawkawlin River, which in turn flows into Saginaw Bay. The nearest body of navigable water to Defendant's property is the Kawkawlin River, which has as its head point of navigation the Michigan Central R.R. bridge in Kawkawlin, Michigan, about four miles above its mouth. *See*

Appendix A: Navigable Waters of the United States in Army Engineering District, Detroit, 1981, available at http:// www/dnr.state.mi.us/enforcement/ publicrights.htm. Thus, the nearest body of navigable water to Defendant's property is roughly twenty linear miles away. Upon reviewing these facts, and upon closely reviewing *Solid Waste Agency*, as well as the Supreme Court's decision in *Riverside Bayview Homes*, the Court finds, as a matter of law, that the wetlands on Defendant's property were not adjacent to navigable waters.

The Supreme Court's opinion in *Solid Waste Agency* is not directly on point, though it does establish a mode of analysis for this Court. In that case, plaintiffs, a consortium of cities in suburban Chicago, sought a place to dispose of solid waste. *See Solid Waste Agency*, 531 U.S. at 162-3, 121 S. Ct. 675. They discovered an abandoned sand and gravel mining pit that was located entirely within Illinois. *See id.* at 163, 121 S. Ct. 675. The site was ideal for plaintiffs, however, over time, small ponds developed on the property. *See id.* Defendants, the Army Corps of Engineers, determined that they had jurisdiction over the property, but refused to issue a permit despite plaintiffs' efforts to comply with all of the requirements for such a permit. *See id.* at 164-5, 121 S. Ct. 675. Defendants based their determination of jurisdiction on the fact that migratory birds were spotted at the site. *See id.* at 164, 121 S. Ct. 675.

The plaintiffs brought an action attacking defendants' jurisdiction over the site. *See id.* at 165, 121 S. Ct. 675. The Supreme Court held that defendants lacked jurisdiction. *See id.* In its analysis, the Supreme Court examined the "migratory bird rule," which was a regulation that defendants promulgated pursuant to § 404 of the CWA. Basically, the "migratory bird rule" stated that defendants' jurisdiction extended to all intrastate waters that are or would be used by birds protected either under migratory bird treaties or other birds that cross

state lines. *See id.* at 164, 121 S. Ct. 675, (citing 51 Fed. Reg. 41217). In order to determine the validity of this regulation, the Supreme Court analyzed defendants' statutory authority, and interpreted the same statute that is involved in this case.

To begin its examination of the meaning of § 404 of the CWA, the Supreme Court looked to its decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985). In *Riverside Bayview Homes*, a developer began to fill in a wetland area, a non-navigable body of water, that was directly adjacent to Black Creek, a navigable body of water.[5] *See id.* at 131, 106 S. Ct. 455. At issue in *Riverside Bayview Homes* was whether a wetland that was immediately adjacent to a body of navigable water could be regulated under § 404 of the CWA, despite the fact that the wetland itself was not navigable. *See id.* at 123, 106 S. Ct. 455. The Supreme Court answered that query in the affirmative, relying on regulations promulgated by the Army Corps of Engineers.

In its opinion in *Riverside Bayview Homes*, the Supreme Court noted the broad definition given "navigable waters" under the CWA, and stated that Congress intended that "at least some waters that would not be deemed navigable under the classic understanding of that term" would be subject to regulation. *Id.* at 133, 106 S. Ct. 455 (citing S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972)). The Supreme Court then examined the regulations promulgated by the Army Corps of Engineers, and noted that the Corps reasoned that the causes of water pollution do not rely on "artificial lines;" rather, because water flows in hydrologic cycles, the regulation of activities that cause water pollution

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[5] Black Creek is a tributary to the Clinton River, which in turn flows into Lake St. Clair. Both the Clinton River and Lake St. Clair are also navigable.

must encompass the entire aquatic system. *See id.* at 134, 106 S. Ct. 455 (citing 42 Fed. Reg. 37128 (1977)). The Supreme Court then quoted the Corps: "'For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States . . . .'" *Id.* at 134, 106 S. Ct. 455 (quoting 42 Fed. Reg. 37128 (1977)). The Supreme Court concluded that this regulation is reasonable in light of the statutory definition.

This Court agrees with the outcome of *Riverside Bayview Homes*. Because the goal of the CWA is to curtail water pollution, the Court agrees with the conclusion that federal jurisdiction must encompass some non-navigable water. Rationally, if a quantity of a toxic chemical was discharged into wetlands that are adjacent to a navigable body of water, such as the wetland in *Riverside Bayview Homes*, that chemical would undoubtedly affect the navigable body of water. An example of that occurred in *Ashland Oil*. There, the defendant discharged 3,200 gallons of oil into a non-navigable tributary, roughly one hundred feet from a creek. *See Ashland Oil*, 504 F.2d at 1319. A short time later, a visible sheen appeared on the creek; in turn, the creek flowed into a navigable river. *See id.* at 1320. Therefore, the Court agrees that it is necessary for the federal government to regulate some non-navigable waters to prevent pollution to navigable waters. *See U.S. v. Krilich*, 152 F.Supp.2d 983, 988 (N. D. Ill. 2001) ("[I]t is still the rule that a nonnavigable (in the traditional sense) wetland *directly adjacent* to a navigable body of water falls within the purview of the CWA . . . .") (emphasis added).

While these cases are informative, they are not binding on this Court because the facts in this case are distinguishable. Defendant's wetlands were not directly adjacent to navigable waters as was the wetland in *Riverside Bayview Homes*, and Defendant's activities did not have the same direct impact on

navigable waters as did the defendant in *Ashland Oil*. These differences are crucial because despite its broad reading of the CWA in *Riverside Bayview Homes*, the Supreme Court concluded in *Solid Waste Agency* that the CWA does have limits. The Supreme Court invalidated the migratory bird rule because the CWA contains the words "navigable waters," which act as a limit on federal jurisdiction. *See Solid Waste Agency*, 531 U.S. at 172, 121 S. Ct. 675.

That analysis applies here, too. The fact remains that § 404 of the CWA uses the words "navigable waters." *See* 33 U.S.C. § 1344. While it is true that the statute does broadly define navigable waters, it is not true that the words "navigable waters" are devoid of any meaning. *See Solid Waste Agency*, 531 U.S. at 172, 121 S. Ct. 675; *see also Riverside Bayview Homes*, 474 U.S. at 133, 106 S. Ct. 455. Indeed, that the statute uses the term "navigable waters" is significant; it has the import of showing this Court what Congress intended as its authority for enacting the CWA: "its traditional jurisdiction over waters that were or had been navigable in fact or which reasonably could be so made." *Solid Waste Agency*, 531 U.S. at 172, 121 S. Ct. 675 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408, 61 S. Ct. 291, 85 L.Ed. 243 (1940)). In other words, the plain text of the statute mandates that navigable waters must be impacted by Defendant's activities.[6]

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[6] Because the Court finds the meaning of the statutory text to be clear, it need not be concerned with the level of deference that it is to give the agency's interpretation of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

(continued...)

Upon reviewing the government's proposed facts, the Court finds, as a matter of law, that the government is unable to prove that Defendant, whose land contained wetlands that are located roughly twenty miles from the nearest body of navigable water, affected any navigable waters.

IV. CONCLUSION

For the reasons stated above, the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property. Therefore, Defendant's conviction is set aside, and this case is DISMISSED.

IT IS SO ORDERED.

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[6] (...continued)

Appendix C1

No. 00-1428

SUPREME COURT OF THE UNITED STATES

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES,

Respondent.

Filed
June 18, 2001.

* * * *

On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petition for writ of certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Solid Waste Agency of No. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed.2d 576 (2001).

Appendix D1

No. 02-1377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	Filed
	)	Sept. 29, 2003
Plaintiff-Appellant,	)	Leonard Green,
	)	Clerk
v.	)	
	)	ORDER
JOHN A. RAPANOS,	)	
	)	
Defendant-Appellee.	)	

BEFORE: MARTIN, Chief Judge; NORRIS and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

Supreme Court, U.S.
FILED
MAR 1 - 2004
OFFICE OF THE CLERK

(4)

No. 03-929

In the Supreme Court of the United States

JOHN A. RAPANOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether wetlands that are adjacent to, and have a surface hydrological connection with, a drain that flows into a creek before reaching traditional navigable waters are part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

2. Whether application of the Clean Water Act to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)	12
Hodel v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981)	22-23
International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987)	3
Needham, In re, 354 F.3d 340 (5th Cir. 2003)	20-21
Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941)	12, 16
Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001)	18, 19, 21
Solid Waste Agency of Northern Cook County v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001)	2, 3, 4, 8, 11-12, 14, 22
United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974)	22, 24
United States v. *Byrd*, 609 F.2d 1204 (7th Cir. 1979)	22
United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), petition for cert. pending, No. 03-701 (filed Nov. 10, 2003)	8, 10, 12, 23, 26
United States v. *Hartsell*, 127 F.3d 343 (4th Cir. 1997)	22
United States v. *Lopez*, 514 U.S. 549 (1995)	23

Cases—Continued: Page

United States v. *Pozsgai*, 999 F.2d 719 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994) 22
United States v. *Rapanos*:
16 Fed. Appx. 345 (6th Cir. 2001) 7
235 F.3d 256 (6th Cir. 2000) 5, 6, 7
115 F.3d 367 (6th Cir.), cert. denied, 522 U.S. 917 (1997) 5, 6
895 F. Supp. 165 (E.D. Mich. 1995), rev'd, 115 F.3d 367 (6th Cir.), cert. denied, 522 U.S. 917 (1997) 6
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 3, 10, 11, 13, 14, 15, 16-17, 24, 26
United States v. *Tull*, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987) 22

Constitution, statutes, regulations and rule:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 23, 24
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 25
Federal Water Polluton Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1311(a) 2, 6
33 U.S.C. 1319(c)(2)(A) 2, 6
33 U.S.C. 1342 (§ 402) 4
33 U.S.C. 1344 (§ 404) 4, 13, 16, 25
33 U.S.C. 1344(a)(§ 404(a)) 4
33 U.S.C. 1344(b) 4
33 U.S.C. 1344(c) 4
33 U.S.C. 1362 3
33 U.S.C. 1362(7) 2-3
33 U.S.C. 1362(12)(A) 2
Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*:
33 U.S.C. 2701(21) 18
33 U.S.C. 2702(a) 18
18 U.S.C. 1512 6
33 C.F.R.:
Section 323.2(a)(2) (1985) 14
Section 323.2(a)(3) (1985) 14
Section 323.2(a)(5) (1985) 14

Regulations—Continued:	Page
Section 323.2(a)(7)(1985)	14
Section 328.3	3, 4
Section 328.3(a)(1)	3, 4
Section 328.3(a)(2)	14
Section 328.3(a)(3)	14
Section 328.3(a)(5)	5
Section 328.3(a)(7)	5
40 C.F.R.:	
Section 230.3(s)	4
Section 230.3(s)(1)	4
Section 230.3(s)(5)	5
Section 233.70	4
Fed. R. Crim. P. 52(b)	9
Miscellaneous:	
42 Fed. Reg. 37,128 (1977)	10

In the Supreme Court of the United States

No. 03-929

JOHN A. RAPANOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 339 F.3d 447. Earlier opinions of the court of appeals are reported at 235 F.3d 256 and 115 F.3d 367. The opinion of the district court (Pet. App. B1-B12) is reported at 190 F. Supp. 2d 1011. An earlier opinion of the district court is reported at 895 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2003. A petition for rehearing was denied on September 29, 2003 (Pet. App. D1). The petition for a writ of certiorari was filed on December 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on two counts of knowingly discharging pollutants into waters of the United States without a permit, in violation of Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1311(a). He was sentenced to three years of probation and fined $185,100. Petitioner appealed the convictions, and the government cross-appealed the sentence. The court of appeals affirmed the convictions and remanded to the district court for resentencing. On June 18, 2001, this Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of the Court's intervening decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). Pet. App. C1.

On remand, the district court set aside the convictions and dismissed the charges. Pet. App. B1-B12. The court of appeals reversed that ruling and reinstated petitioner's convictions. *Id.* at A1-A12. In light of its decision on the prior appeal, the court also remanded for resentencing. *Id.* at A12.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). A person who "knowingly" violates that prohibition is subject to potential felony penalties. 33 U.S.C. 1319(c)(2)(A). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the

United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").[1] In *Riverside Bayview*, the Court upheld the assertion by the United States Army Corps of Engineers (Corps) of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *SWANCC*, this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. 531 U.S. at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). At all times relevant to this case, the State of Michigan had an approved Section 404 permit program covering the waters at issue. See 40 C.F.R. 233.70. Under Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the United States Environmental Protection Agency (EPA) (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). The definition, as it relates to this case, encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "tributaries" to tradi-

tional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).

3. Petitioner owns a 175-acre parcel of land in Williams Township, Michigan. In 1988, petitioner entered into an option agreement with a developer that contemplated the possible use of the tract as the site of a shopping mall. In order to make the land more suitable for development, and thus more attractive to the optionee, petitioner cleared the heavily-wooded property of trees and shrubs, and he eradicated forested wetlands on the property by filling them with sand. Petitioner carried out those activities despite repeated warnings from his own environmental consultants, from the Michigan Department of Natural Resources, and from the EPA that the property contained wetlands and that the discharge of fill material would require a permit. Pet. App. A2-A3; *United States* v. *Rapanos*, 115 F.3d 367, 368-369 (6th Cir.), cert. denied, 522 U.S. 917 (1997) (*Rapanos II*); *United States* v. *Rapanos*, 235 F.3d 256, 260 (6th Cir. 2000) (*Rapanos III*).

Until its alteration through petitioner's fill activities, the property in question contained at least 29 acres of wetlands. See Pet. App. A3. Those wetlands "are connected to the Labozinski Drain (a one hundred year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin eventually flows into Saginaw Bay and Lake Huron." *Id.* at A2; see Gov't C.A. Br. 10. "During the course of this proceeding, the wetlands in question have been described as between eleven and twenty miles from the nearest navigable-in-fact water." Pet. App. A2.

4. a. On July 27, 1994, a federal grand jury returned a second superseding indictment charging petitioner with two counts of knowingly discharging pollutants into the waters of the United States, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A), and two counts of witness tampering, in violation of 18 U.S.C. 1512. See *United States* v. *Rapanos*, 895 F. Supp. 165, 166 (E.D. Mich. 1995), rev'd, 115 F.3d 367 (6th Cir.), cert. denied, 522 U.S. 917 (1997) (*Rapanos I*). The CWA counts alleged that petitioner had knowingly deposited fill material into wetlands without an authorizing permit. *Ibid*; see Pet. App. A3.[2]

On March 7, 1995, the jury found petitioner guilty on both CWA counts. *Rapanos I*, 895 F. Supp. at 166. On August 3, 1995, the district court granted petitioner's motion for a new trial on the ground that the government had improperly cross-examined petitioner about his refusal to consent to warrantless searches of the property by state regulatory officials. *Id.* at 167-170; see Pet. App. A3. The government appealed, and the court of appeals reversed. *Rapanos II*, 115 F.3d at 372-374; see Pet. App. A3. On remand, the district court sentenced petitioner to three years of probation and a fine of $185,100. See *Rapanos III*, 235 F.3d at 258.

b. Petitioner appealed his convictions, and the government cross-appealed the sentence imposed by the district court. On December 15, 2000, the court of appeals affirmed petitioner's convictions and remanded

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[2] The witness tampering counts alleged that petitioner had threatened one of his environmental consultants for the purpose of intimidating him into keeping silent and destroying his records and reports, which had confirmed the presence of extensive wetlands on the property. See Pet. App. A2; *Rapanos II*, 115 F.3d at 368-369. The district court dismissed those counts at the conclusion of the government's case. See *Rapanos I*, 895 F. Supp. at 166.

for resentencing. *Rapanos III*, 235 F.3d at 258-261. With respect to petitioner's appeal, the court stated only that it had "reviewed each of [petitioner's] claims and f[ou]nd that the district court did not err." *Id.* at 258. With respect to the government's cross-appeal, the court of appeals held that the district court had erred in granting two one-level downward departures and a two-level decrease for acceptance of responsibility in determining the applicable sentencing range under the Sentencing Guidelines. *Id.* at 258-261.

c. Three weeks after the court of appeals' ruling in *Rapanos III*, this Court issued its decision in *SWANCC*. Petitioner filed a petition for a writ of certiorari (No. 00-1428), contending that reversal of his convictions was mandated by *SWANCC*. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case to the Sixth Circuit for further consideration in light of *SWANCC*. Pet. App. C1. The court of appeals in turn remanded the case to the district court. *United States* v. *Rapanos*, 16 Fed. Appx. 345 (6th Cir. 2001) (remanding to district court); see Pet. App. A4.

d. The district court vacated petitioner's convictions and dismissed the indictment. Pet App. B1-B12. Based on the indirect nature of the surface water connection between the relevant wetlands and the Kawkawlin River, *id.* at B7, and on the court's view that "the nearest body of navigable water to [petitioner's] property is roughly twenty linear miles away," *id.* at B8, the district court found, "as a matter of law, that the wetlands on [petitioner's] property were not adjacent to [traditional] navigable waters," *ibid.* The court stated that Congress's use of the term "navigable waters" in the CWA "has the import of showing * * * what Congress intended as its authority for enacting the CWA: 'its

traditional jurisdiction over waters that were or had been navigable in fact or which reasonably could be so made.'" *Id.* at B11 (quoting *SWANCC*, 531 U.S. at 172). From that fact, the district court inferred that "the plain text of the statute mandates that [traditional] navigable waters must be impacted by [petitioner's] activities." *Ibid.* The court found that the government had failed to prove that petitioner's filling activities had actually "affected any navigable waters." *Id.* at B12. The court then concluded that "the wetlands on [petitioner's] property were not directly adjacent to navigable waters, and therefore, the government cannot regulate [petitioner's] property." *Ibid.*

e. The court of appeals reversed the judgment of the district court and reinstated petitioner's convictions. Pet. App. A1-A12. Relying in part on *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), petition for cert. pending, No. 03-701 (filed Nov. 10, 2003), the court rejected petitioner's contention that the coverage of the CWA is limited to "wetlands directly abutting navigable water." Pet. App. A10; see *id.* at A8-A10. The court of appeals quoted with approval the *Deaton* court's holding that the "nexus between a navigable waterway and its nonnavigable tributaries * * * is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted." *Id.* at A9 (quoting *Deaton*, 332 F.3d at 712). The court of appeals concluded that the surface water connection between petitioner's wetlands and traditional navigable waters was a sufficient basis for the exercise of federal regulatory authority under the CWA:

> The evidence presented in this case suffices to show that the wetlands on [petitioner's] land are ad-

> jacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that [petitioner's] wetlands are covered by the Clean Water Act. Any contamination of [petitioner's] wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. * * * Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.

Id. at A10 (citation omitted).

Petitioner also contended that, even if the government's views about the scope of the CWA's coverage were found to be correct, he was still entitled to a new trial because the instructions used to define the term "waters of the United States" would have permitted the jury to find him guilty based on the sort of connection to interstate commerce (*e.g.*, use of the wetlands as habitat for migratory birds) that the Court in *SWANCC* found to be an insufficient basis for the exercise of federal regulatory authority under the CWA. The court of appeals rejected that argument. Pet. App. A10-A12. The court observed that petitioner had not objected to the relevant jury instruction but in fact had specifically requested it, and that petitioner therefore could prevail only if he satisfied the requirements governing plain-error review under Federal Rule of Criminal Procedure 52(b). See Pet. App. A11. The court found that the challenged instruction accurately stated the governing law. *Id.* at A11-A12. The court also found "no indication" that any error in the instruction had affected petitioner's "substantial rights." *Id.* at A12. The court explained that, in light of the evidence

upon which the government had relied to establish that petitioner's wetlands were covered by the CWA, "the jury could not have based its decision on impermissible grounds." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 8-15) that the court of appeals' construction of the CWA as applying to the wetlands at issue in this case is inconsistent with this Court's decisions in *Riverside Bayview* and *SWANCC*. Petitioner reads those decisions as holding that "only those wetlands that physically abut traditional navigable waters, and are inseparably bound up with those waters, are subject to federal jurisdiction." Pet. 8. That claim lacks merit.

a. The Corps and EPA regulations defining the CWA term "the waters of the United States" have long been premised on the fact that, because "[w]ater moves in hydrologic cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system." *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)); see *Deaton*, 332 F.3d at 707 ("[T]he principle that Congress has the authority to regulate discharges into non-navigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); Pet App. A6 ("As common sense makes clear, the Clean Water Act cannot purport to police only the navigable-in-fact waters in the United States in order to keep those waters clean from pollutants."). Exclusion of nonnavigable tributaries and their adjacent wetlands from the coverage of the CWA would subvert Congress's efforts to ensure that the quality of traditional navigable waters is adequately protected. To prevent that result, the

Corps and EPA have reasonably defined the term "waters of the United States" to include wetlands adjacent to tributaries that flow into traditional navigable waters.

b. This Court's decision in *SWANCC* does not cast doubt on the propriety of that regulatory determination. To the contrary, the Court in *SWANCC* quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). And while the Court in *SWANCC* rejected the Corps' construction of the term "waters of the United States" as encompassing isolated ponds based on their use as habitat for migratory birds, *id.* at 171-172, its reasoning does not cast doubt on the propriety of the assertion of federal regulatory authority here.

The Court in *SWANCC* explained that, if the use of isolated ponds by migratory birds were found to be a sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. 531 U.S. at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some substantive content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its tradi-

tional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

Unlike the Corps' effort in *SWANCC* to regulate "isolated" waters based solely on their use as habitat by migratory birds, the regulation of petitioner's conduct rests squarely on the longstanding authority of the federal government to protect traditional navigable waters. "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707. Construing the CWA term "waters of the United States" to encompass wetlands adjacent to tributaries that flow into traditional navigable waters thus gives independent content to the term "navigable," and accords with the established understanding of congressional power to regulate and protect traditional navigable waters. See *id.* at 707, 709-710; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control projects on intrastate nonnavigable tributaries in order to prevent flooding in traditional navigable rivers); see also *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001) (upholding CWA jurisdiction over nonnavigable irrigation canals that receive water from, and divert water to, natural streams and lakes). As the court of appeals held, the surface water connection between the wetlands on petitioner's property and the Kawkawlin River (and ultimately Lake Huron) establishes a "significant nexus" between petitioners' wetlands and traditional navigable waters because "[a]ny contamination of [petitioner's] wetlands could affect the [Labozinski] Drain, which, in turn could affect navigable-in-fact waters." Pet. App. A10.

c. Concededly, not every discharge of fill material into "the waters of the United States" (as the Corps and EPA have defined the term) can be expected to have deleterious effects on the quality of traditional navigable waters. That fact, however, does not cast doubt on the propriety of the agencies' adjacent wetlands regulations. As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Thus, inclusion of petitioner's wetlands within the regulatory definition of "waters of the United States" does not mean that filling of such wetlands is necessarily prohibited. It simply means that the Corps (or, in this case, the Michigan permitting agency, see p. 4, *supra*) will analyze (and attempt to mitigate) the likely impacts of proposed discharges before deciding whether a particular project may go forward. By discharging pollutants into his wetlands without seeking a Section 404 permit, petitioner prevented the state permitting agency from making that determination.

d. Petitioner contends (Pet. 11-12) that the CWA covers only those wetlands that directly abut traditional navigable waters. Petitioner relies (Pet. 11) on this Court's statement in *SWANCC* that jurisdictional authority under the CWA does not "extend[] to ponds that are *not* adjacent to open water." 531 U.S. at 168. Petitioner appears to construe the term "open water," as it appears in the *SWANCC* opinion, to refer solely to traditional navigable waters.

Petitioners' effort to equate the term "open water" with traditional navigable waters is unfounded. When the Court in *SWANCC* referred to ponds "that are *not* adjacent to open water," 531 U.S. at 168, it was alluding to a footnote in *Riverside Bayview* in which the Court had reserved the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. 323.2(a)(2) and (3) (1985)." *Riverside Bayview*, 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other regulated waters, without regard to those waters' navigability.[3]

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[3] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (a)(7) (1985), which encompass nonnavigable tributaries and wetlands adjacent to those tributaries.

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps [and] bogs." *Riverside Bayview*, 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id.* at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes, rivers, and streams," without reference to navigability). Finally, under petitioner's interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tributaries, even if those tributaries are themselves part of "the waters of the United States." That view cannot be reconciled with *Riverside Bayview*'s square holding that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135.

e. Petitioner contends (Pet. 14) that nonnavigable tributaries and their adjacent wetlands need not be treated as part of "the waters of the United States" in order to protect the quality of traditional navigable waters. Petitioner suggests (*ibid.*) that, even under his reading of the CWA, an upstream discharge may provide grounds for civil or criminal liability under the Act if the government can prove that pollutants actually flowed to traditional navigable waters downstream. For at least two reasons, petitioner's proposed approach would provide insufficient protection for traditional navigable waters.

First, Congress is not required to wait until harm to traditional navigable waters actually materializes, but can act to prevent that harm by prohibiting or controlling particular activities in nonnavigable waters upstream. See, *e.g.*, *Oklahoma ex rel. Phillips*, 313 U.S. at 525-528 (Congress has power to control activities in nonnavigable tributaries of traditional navigable waters in order to prevent flooding downstream). Congress's authority to prevent pollutant discharges that will actually degrade the quality of traditional navigable waters necessarily includes the power to devise reasonable procedures for determining, *before* a particular discharge occurs, whether the discharge is likely to have that effect. The Section 404 permitting process serves in part to assist the permitting agency in making that determination. See *Riverside Bayview*, 474 U.S. at 135 n.9 (acknowledging that the Corps' definition of the term "waters of the United States" may encompass "some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways," but finding that prospect to be "of little moment" because the Corps in such circumstances may allow development to go forward simply by issuing a permit); p. 13, *supra*. The regulatory regime would be severely undermined if the exercise of federal authority over a pollutant discharge required proof that harm to traditional navigable waters had *already* occurred.

Second, the harm caused by discharges of dredged or fill material into wetlands is not limited to the potential for sediment to be released downstream. An even greater potential for harm arises from the *filling* of wetlands, which reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside*

Bayview, 474 U.S. at 134-135. Under petitioner's reading of the CWA, however, the Act would do nothing to prevent that harm, since impairment of wetlands' ability to perform those functions does not itself constitute the "discharge" of a pollutant into traditional navigable waters.

f. Petitioner repeatedly describes the wetlands at issue in this case as "isolated" wetlands. See Pet. i, 3, 4, 7, 12, 15, 19, 20, 21, 23, 24, 25. The use of the term "isolated" to describe wetlands that do not directly abut a traditional navigable water, however, has no legal significance. The CWA's coverage extends to wetlands that do not abut traditional navigable waters when those wetlands are adjacent to nonnavigable tributaries of traditional navigable waters. Such wetlands are not truly "isolated" because of the surface hydrological connection to traditional navigable waters. To the extent that petitioner questions the actual existence of a surface water connection between the wetlands on his property and traditional navigable waters, the court of appeals decided this case based on the determination that such a connection exists. See Pet. App. A2, A10. Petitioner's fact-specific disagreement with that assessment of the record does not warrant this Court's review.[4]

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[4] Petitioner states that "the district court found that no hydrological connection was ever established between the wetlands and the nearest [traditional] navigable waterbody." Pet. 12 (emphasis and internal quotation marks omitted). That is incorrect. The district court recognized that "evidence was introduced at trial supporting [the government's] position that the wetlands on [petitioner's] property were connected to navigable waters." Pet. App. B6; see, *e.g.*, 02/01/95 Tr. 175-177 (government's expert testifies, based on analysis of a geological survey map and on his own inspection of the site, that the subject wetlands were

2. Contrary to petitioner's contention (Pet. 15-18), the Sixth Circuit's decision in this case does not squarely conflict with any decision of another court of appeals.

a. Petitioner's reliance (Pet. 16-17) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, where that oil was alleged to have migrated into various types of waters. See *Rice*, 250 F.3d at 265-266. Like the CWA, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

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connected by surface water to Saginaw Bay). The district court suggested that the instructions given at trial might have permitted the jury to find petitioner guilty even without determining that such a hydrological connection existed. See Pet. App. B6-B7. The court of appeals held, however, that petitioner's challenge to the jury instructions provided no basis for reversal of his convictions because petitioner had affirmatively requested those instructions; the instructions were consistent with the governing law; and any instructional error did not affect petitioner's "substantial rights." *Id.* at A10-A12. Petitioner has not sought review of that holding in this Court. Petitioner suggests in passing that, even if this Court agrees with the Sixth Circuit about the scope of the CWA's coverage, petitioner is nevertheless entitled to a new trial to determine whether a surface water connection actually exists between the relevant wetlands and any traditional navigable water. See Pet. 12 n.2. Petitioner does not explain, however, on what basis he would be entitled to that relief, or why his request for that remedy would warrant this Court's review.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. The decision therefore does not conflict with the Sixth Circuit's ruling in the instant case, which upheld the exercise of federal regulatory authority under the CWA based on the presence of such a connection.

b. For similar reasons, the Fifth Circuit's decision in *In re Needham*, 354 F.3d 340 (2003), does not squarely conflict with the Sixth Circuit's decision here. *Needham*, like *Rice*, involved a suit under the OPA. See *id.* at 342. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at 346-347. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 346. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at 347.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Sixth and Fourth Circuits in the instant case and *Deaton*, and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves

navigable nor truly adjacent to navigable waters." 354 F.3d at 345. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at 347 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at 347, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water. Thus, even assuming that the Fifth Circuit follows the *Needham* dictum in a future case where the issue is actually presented, it is unclear to what extent the approaches taken by the Sixth and Fifth Circuits would lead to different results in concrete factual settings.

It should also be noted that the Fifth Circuit in *Needham* sustained the application of the OPA to the defendants' conduct based on the ultimate downstream presence of oil in Bayou Folse. See 354 F.3d at 346-347; p. 20, *supra*. The court did not examine whether the drainage ditch (the site of the original discharge) or Bayou Cutoff (the body of water into which the ditch directly flowed) was itself "adjacent" (as the court understood that term) to any traditional navigable water. Rather, the court framed the relevant question as "whether Bayou Folse, the site of the farthest traverse of the spill," satisfied the court's adjacency requirement. *Id.* at 346.

Thus, where it can be shown that an oil discharge has actual downstream effects, the Fifth Circuit (correctly) regards the OPA as applicable even if the first water body into which oil is discharged does not meet the court's standard for being "actually navigable or * * *

adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The Fifth Circuit may also decide, in an appropriate future case, that an upstream discharge is covered by the OPA where the downstream effects of an oil discharge are potential rather than actual (*e.g.*, where remedial measures prevent discharged oil from reaching waters that the Fifth Circuit regards as "adjacent" to traditional navigable waters). The Fifth Circuit's willingness to consider the downstream effects of an oil discharge in determining the applicability of the OPA further diminishes the current practical significance of that court's dictum expressing apparent disagreement with the regulatory approach adopted by the government and sustained by the Sixth Circuit in this case.

3. In *SWANCC*, this Court found that application of the CWA to intrastate, nonnavigable, isolated waters, based on the presence of migratory birds, would raise serious constitutional questions. See *SWANCC*, 531 U.S. at 172-173. Petitioner contends (Pet. 19-24) that application of the CWA to the wetlands at issue here would raise similar constitutional concerns. Every court of appeals that has addressed the question, however, has held that the CWA may constitutionally be applied to nonnavigable tributaries and their adjacent wetlands.[5] Petitioner's constitutional challenge lacks merit and does not warrant this Court's review.

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[5] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Hartsell*, 127 F.3d 343, 348-349 (4th Cir. 1997); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 282, n.21 (1981) (citing

a. Contrary to petitioner's contention (Pet. 19), the assertion of federal regulatory authority over petitioner's wetlands is faithful to this Court's holding in *SWANCC* that "the word 'navigable' must inform the government's interpretation of the jurisdictional reach of the Clean Water Act." The isolated waters at issue in *SWANCC* had no hydrological connection, and the asserted basis for CWA jurisdiction bore no relation, to traditional navigable waters. By contrast, the wetlands at issue here have an established surface water connection to the Kawkawlin River, and ultimately to Lake Huron. Because the Corps' exercise of regulatory authority over petitioner's discharges serves the quintessential federal goal of protecting and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. See p. 12, *supra*. Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," *Deaton*, 332 F.3d at 706—the first of the three categories of permissible Commerce Clause legislation identified by this Court in *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)—and that power "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters," *Deaton*, 332 F.3d at 707.

Riverside Bayview squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves

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favorably to *Ashland Oil* and *Byrd* and agreeing that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of [intrastate] activities causing air or water pollution, or other environmental hazards that may have effects in more than one state").

meet traditional tests of navigability, based on their hydrological connections to traditional navigable waters. See 474 U.S. at 133.[6] And while *Riverside Bayview* did not involve a Commerce Clause challenge to the Corps' regulation, petitioner does not question Congress's constitutional authority to regulate pollutant discharges into wetlands that directly abut traditional navigable waters. See Pet. 21 (arguing that the Court should "limit[] the scope of the Clean Water Act to navigable waters and wetlands adjacent to such waters"). Once it is accepted that Congress can protect *some* intrastate waters (including wetlands) that do not themselves satisfy traditional standards of navigability, based on the danger that discharges into those waters may impair the quality of traditional navigable waters downstream, there is no reason that the scope of Congress's *constitutional* authority should depend on the distance between the regulated discharge and the nearest traditional navigable water, or on the number of

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[6] The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system can be expected, as a general matter, to have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead. As the Sixth Circuit explained 30 years ago:

> It would, of course, make a mockery of [Congress's Commerce Clause] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.
>
> Such a situation would have vast impact on interstate commerce.

United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

"links" in the surface water connection between the two.

b. Petitioner contends (Pet. 22-24) that, if the CWA is construed to cover the discharges at issue here, the Act intrudes unduly into state land-use regulation and thereby upsets the federal-state balance. Petitioner's assertion (Pet. 24) that the Corps and EPA have engaged in "all-encompassing federal regulation of intrastate waters" is baseless. Even with respect to those waters that are encompassed by the regulatory definition of "waters of the United States," the only activity that requires a CWA permit is the discharge of a pollutant from a point source.[7] Other functions and activities relating to land use remain in the hands of the local authorities. In addition, the CWA provides States the opportunity to assume responsibility for the administration of the Section 404 permitting program. See p. 4, *supra*. Because the State of Michigan has an approved permitting program covering the waters at issue here, state rather than federal regulators would have acted on any permit application that petitioner submitted. Petitioner's claim of unconstitutional intrusion on state regulatory authority is therefore particularly unavailing under the circumstances of this case.

In any event, the federal government possesses longstanding authority to protect the quality of traditional navigable waters by regulating upstream pollutant dis-

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[7] Moreover, once the Corps or EPA has issued its final decision on a CWA permit application, that decision is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Thus, even with respect to development activities that involve pollutant discharges into "the waters of the United States," petitioner's suggestion (Pet. 22) that the CWA gives federal regulators an "actual veto power" over those projects is considerably overstated.

charges. See p. 12, *supra*. As cases like *Riverside Bayview* make clear, the exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the assertion of federal regulatory authority in this case was an otherwise permissible use of the power to protect traditional navigable waters, the requirement that petitioner seek a CWA permit for his fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-929

In the

Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT

I. THERE IS A CLEAR SPLIT BETWEEN THE SIXTH CIRCUIT IN THIS CASE AND THE FIFTH CIRCUIT COURT OF APPEALS 2

II. THE SIXTH CIRCUIT FAILED TO PROPERLY APPLY *SWANCC* ON REMAND 3

III. THE WETLANDS ON MR. RAPANOS' PROPERTY DO NOT ABUT A TRADITIONAL NAVIGABLE WATERWAY 4

IV. RESPONDENT'S INTERPRETATION OF THE CWA IS INSUPPORTABLE FACTUALLY, LEGALLY, AND LOGICALLY 6

V. THE DECISION BELOW RAISES THE SAME SERIOUS CONSTITUTIONAL QUESTIONS AS THE "MIGRATORY BIRD RULE" INVALIDATED IN *SWANCC* 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Deaton v. United States
(Docket No. 03-701) 1

In Re Needham,
354 F.3d 340 (5th Cir. 2003) 2-3, 5

Newdunn v. United States
(Docket No. 03-637) 1

Rewis v. United States,
401 U.S. 808 (1971) 3

Rice v. Harken Exploration Co.,
250 F.3d 264 (5th Cir. 2001) 2-3

Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corp of Engineers,
531 U.S. 159 (2001) ..... passim

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 4

United States v. Universal C.I.T. Credit Corp.,
344 U.S. 218 (1952) 9

Statutes

33 U.S.C. § 1319 8

Miscellaneous

Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,
General Accounting Office Report, GAO-04-297
(Feb 27, 2004) 1

INTRODUCTION

Few petitions provide more compelling reasons for review than this case: (1) In the context of a criminal conviction this case raises an important federal question about the scope of the Clean Water Act (CWA); (2) the Sixth Circuit decision below is in clear conflict with the Fifth Circuit; and, (3) the Court of Appeal's interpretation of the CWA conflicts with this Court's landmark case of *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corp of Engineers*, 531 U.S. 159 (2001), and raises serious constitutional questions.

Moreover, two other pending petitions raise nearly identical questions to this case—whether the federal government may regulate wetlands under the CWA that do not abut a body of open water but instead lie miles away from the nearest navigable waterway. *See Newdunn v. United States* (Docket No. 03-637) and *Deaton v. United States* (Docket No. 03-701). More than fifteen amicus briefs were filed in support of these petitions representing a score of state, local, and private entities and thousands of constituents across the country. Under the CWA, the federal government claims authority over millions of acres of remote wetlands and other waters in every state in the Nation. In effect, the government wields a federal veto power over local land and water use in contravention of the intent of Congress, this Court's precedent, and established principles of federalism.

Review in this case is also underscored by a recent General Accounting Office report documenting the Corps' inconsistent (if not arbitrary) jurisdictional determinations that follow from a lack of clear guidance on the scope of the CWA. *See Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb 27, 2004); *See also* the Supplemental Brief for Petitioners in *Newdunn v. United States* (0-3637)

ARGUMENT

I

THERE IS A CLEAR SPLIT BETWEEN THE SIXTH CIRCUIT IN THIS CASE AND THE FIFTH CIRCUIT COURT OF APPEALS

Respondent United States claims that there is no "square conflict" between this case and the Fifth Circuit decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) and *In Re Needham*, 354 F.3d 340 (5th Cir. 2003). Opposition to Petition for Writ of Certiorari (Opp.) at 18-22. But that is wishful thinking. Although those cases involved the Oil Pollution Act (OPA), the court found that the definition of "navigable waters" in that statute was co-extensive with the definition of "navigable waters" in the CWA. Thus, the court relied on this Court's decision in *SWANCC* to determine the scope of jurisdictional waters under both acts.

In *Needham*, the Fifth Circuit expressly rejected the holding of the Sixth Circuit in this case. The Fifth Circuit began by questioning the government's definition that jurisdictional waters under the CWA included all waters that have a hydrological connection with "navigable waters." Citing the Sixth Circuit decision in this case with disapproval for agreeing with the government's "expansive interpretation," the Fifth Circuit stated in unequivocal terms : "In our view this definition is unsustainable under *SWANCC*." And further, "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *In Re Needham*, 354 F.3d at 345.

So that there would be no doubt about the law of the Fifth Circuit, and to clearly distinguish it from the law of the Sixth Circuit, the court stated:

> Consequently, *in this circuit* the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Id. at 345-46 (emphasis added), (citing *Rice v. Harken Exploration Co.*, 250 F.3d at 269).

II

THE SIXTH CIRCUIT FAILED TO PROPERLY APPLY *SWANCC* ON REMAND

In 2001, this Court granted Mr. Rapanos' petition for writ of certiorari, vacated Mr. Rapanos' conviction of filling wetlands without a permit, and remanded the case to the Sixth Circuit for consideration in light of *SWANCC*. In *SWANCC*, this Court determined that the CWA was intended to cover traditional navigable waters and some wetlands that abut and are inseparably bound up with such waters. *See SWANCC*, 531 U.S. at 172. This Court declined the government's invitation to extend the CWA to more remote waters. *Id.* at 171-72.

However, based on a theory that the CWA encompassed any water with a potential hydrological connection to a traditional navigable water, the Sixth Circuit reinstated Mr. Rapanos' conviction with sanctions, including a fine of $185,000, three years probation, and at least ten months in federal prison. Thus, the Sixth Circuit criminalized conduct that this Court had determined in *SWANCC* was beyond the reach of the CWA. The unique posture of this case, as well as the rule of lenity[1], justifies review by this Court.

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[1] This Court has stated that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971).

III

THE WETLANDS ON MR. RAPANOS' PROPERTY DO NOT ABUT A TRADITIONAL NAVIGABLE WATERWAY

Respondent takes issue with Petitioner's claim that the district court found that no hydrological connection was ever established between the wetlands on Mr. Rapanos' property and the nearest navigable waterbody. *See* Opp. at n.4. Instead, Respondent implies that the district court simply accepted Respondent's evidence of a hydrological connection. But this is incorrect. According to the trial court, the government did introduced evidence "supporting its position that the wetlands on Defendant's property were connected to navigable waters." But the court concluded: "That fact, however, was never explicitly found, either by the jury or by this Court, nor was such a finding necessitated by the jury instructions." Pet. Appendix B6. Although the Court of Appeals "decided this case based on the determination that such a connection exists," Opp. at 17, that "determination" was not made by the trier of fact and the Court of Appeals did not find that the trial court had erred. Rather, the Court of Appeals assumed the connection existed and upheld the conviction. But in either case, with or without a hydrological connection, the government does not have authority under the CWA to regulate wetlands, like those on Mr. Rapanos' property, that do not physically abut a traditional navigable water.

In *SWANCC*, this Court stated it had allowed regulation of wetlands abutting a traditional navigable waterway in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), because the wetlands in that case were "inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167. According to this Court, "[i]t was the significant nexus between the wetlands and "navigable waters" that informed [its] reading of the CWA in *Riverside Bayview Homes*." *Id.* But no

such showing has been made in this case. The wetlands on Mr. Rapanos' property purportedly lie near a drainage ditch and do not abut a traditional "navigable water" as did the wetlands in *Riverside Bayview Homes*. Nor is there a significant nexus with a traditional "navigable water" as existed in that case. To the contrary, the wetlands on Mr. Rapanos' property are exactly like the wetlands about which this Court did not express an opinion in *Riverside Bayview Homes*. "Indeed, we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . .'" *Id.* However, in *SWANCC*, this Court did express an opinion precisely on the question presented in this case: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."[2] *Id.* at 168.

This conclusion that the statute does not allow federal regulation of waters that are not adjacent to open bodies of navigable waters is based on the limitations inherent in Congress' use of the term "navigable waters." As this Court

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[2] The United States goes to great lengths to undermine this clear statement by suggesting that the term "open water" does not mean only traditional navigable water as the context of the statement would suggest, but implies it could mean any water in the entire tributary system. *See* Opp. at 14-15. Apparently, the government would have us believe that this Court was thinking as much of ditches, culverts, and sewers in its use of the term "open water" as of navigable lakes and rivers. It is also noteworthy that the Fifth Circuit in *In Re Needham* equates the term "open water" with navigable waters, thus broadening the conflict between this case and the Fifth Circuit: "[U]nder *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an *open body of navigable water*.' " *In Re Needham* 354 F.3d at 345-46 (emphasis added).

observed, the term 'navigable' shows us that Congress enacted the CWA based on its "traditional jurisdiction" over navigable waters. *See SWANCC*, 531 U.S. at 172. Therefore, Respondent's contention that its expansive interpretation of the CWA is "faithful to this Court's holding in *SWANCC*" is without merit. Opp. at 23.

IV

RESPONDENT'S INTERPRETATION OF THE CWA IS INSUPPORTABLE FACTUALLY, LEGALLY, AND LOGICALLY

Respondent argues that if Congress can protect *some* nonnavigable, intrastate waters (including wetlands), "based on the danger that discharges into those waters may impair the quality of traditional navigable waters downstream," then there is no reason to limit Congress' constitutional authority over such waters regardless of the distance or number of surface water "links" between the regulated discharge and the nearest traditional navigable water. Opp. at 24-25.

This position is faulty for a number of reasons. First, reliance on the term "may impair" would allow the government to regulate any water with a mere hypothetical connection to navigable water. Moreover, Respondent concedes that not every discharge of fill material into a wetland will have "deleterious effects on the quality of traditional navigable waters." Opp. at 13. In fact, such is the case here. But we are told that doesn't matter because the government may allow development of the wetland for other uses simply by issuing a permit. Opp. at 13. But this invidious argument misses the point. The question here is not whether Mr. Rapanos can get a section 404 permit based on the largess of the government, but whether the government has authority to regulate the wetlands on Mr. Rapanos' property at all.

Second, this Court's allowance for federal regulation of some wetlands "that do not themselves satisfy traditional standards of navigability" was based on the interconnectedness of those wetlands with an abutting navigable water and not merely on the risk of impairment to navigable waters somewhere downstream:

> We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States.' It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.

SWANCC, 531 U.S. at 167.

This narrow exception to this Court's conclusion that Congress intended to limit the reach of the CWA to traditional navigable waters, as evidenced by Congress' repeated use of the term "navigable," does not translate into wholesale authority to regulate any water hydrologically connected to a navigable water. That would allow the exception to swallow the rule and would read navigability right out of the Act. As this Court warned, "such a ruling would assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'" *Id.* at 172.

Respondent's premise that the federal government can (and must) regulate all upstream waters to protect the navigable waters downstream is not supported by either the text of the CWA or this Court's decision in *SWANCC*. Moreover, such a broad regulatory reach is not necessary to effect the purposes of the Act. The CWA is designed to protect navigable waters by regulating navigable waters. It does not and need not authorize the regulation of any water that may connect to a navigable water. Under the CWA, any actual discharge to a traditional navigable water without a permit is a violation of the Act and

punishable by substantial civil and criminal penalties. *See* 33 U.S.C. § 1319. These penalties serve as a significant deterrent to such discharges .

And third, Respondent's position that the distance and number of "links" between the regulated discharge and the nearest traditional navigable water should have no bearing on the reach of federal jurisdiction under the CWA is illogical. It is a matter of common sense that the discharge to a remote wetland with a tenuous hydrological connection to other waters is likely to have little or no effect on navigable waters downstream, thus obviating the need for wholesale regulation of such wetlands. In addition, Respondent seems to be laboring under a misapprehension that the scope of the CWA is limited only by the reach of the Constitution and not the language of the Act itself. The government made the same mistake in *SWANCC*, arguing that Congress intended the CWA to be enforced to the limits of Congress' Commerce Clause authority. But this Court dispelled that notion in a footnote.

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. rep. No. 92-1236, p.144 (1972), neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation.

SWANCC, 531 U.S. at 168 n.3.

V

THE DECISION BELOW RAISES THE SAME SERIOUS CONSTITUTIONAL QUESTIONS AS THE "MIGRATORY BIRD RULE" INVALIDATED IN *SWANCC*

Respondent claims the decision below does not raise a constitutional conflict. But the government fails to find support in *SWANCC* for this proposition. In *SWANCC* this Court indicated that the "Migratory Bird Rule" invoked the outer limits of Congress' commerce power: (1) because it was unclear whether the government could establish a "substantial effect" on interstate commerce by reference to intrastate activities, like the filling of ponds or wetlands; and (2) because the imposition of federal jurisdiction over such things as ponds and mudflats "would result in a significant impingement of the State's traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 173-74. Unfortunately, the decision below authorizes the regulation of any waters with an actual or perceived hydrological connection to a traditional navigable water. This extends federal authority under the CWA virtually as far as the "Migratory Bird Rule." It certainly raises the same serious constitutional questions about the aggregation of intrastate activities and federal encroachment on traditional state power that vexed this Court in *SWANCC*.

In such cases, this Court requires that Congress give "a clear indication that Congress intended that result." *Id.* at 172. This is particularly true when the statute involves criminal sanctions, such as the Act in this case. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

Interestingly, Respondent has ignored this requirement of a "clear indication" of congressional intent. Perhaps because it must. Congress has given no indication that it intended to push the limits of its commerce power and alter the federal-state framework by treading on traditional state powers. To the contrary, in the CWA "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources . . . .'" *SWANCC*, 531 U.S. at 174 (citing 33 U.S.C. § 1251(b)).

CONCLUSION

This case raises an important federal question about CWA jurisdiction in the context of a criminal conviction. It also conflicts with the Fifth Circuit and this Court's *SWANCC* decision on which the remand was based. In addition, this case raises the same serious constitutional questions which resulted in the invalidation of the "Migratory Bird Rule."

For these reasons, this Court should grant Mr. Rapanos' petition for writ of certiorari.

DATED: March, 2004.

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In The
Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, et al., *Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *Respondent.*

JAMES S. and REBECCA DEATON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOHN A. RAPANOS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Fourth And Sixth Circuits

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, FLORIDA STORMWATER ASSOCIATION, FLORIDA ASSOCIATION OF SPECIAL DISTRICTS, SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CITY OF CLEWISTON IN SUPPORT OF THE PETITION FOR WRITS OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals are deeply divided over the meaning of "navigable waters" and the principles enunciated in *Solid Waste Agency of Northern Cook County* v. *United States Corps of Engineers*, 53 U.S. 159 (2001). What constitutes a "navigable water" determines the scope of federal regulatory jurisdiction and, thus, delineates federal and state roles in protection of the nation's waters under the Clean Water Act, the Oil Pollution Act and other significant federal legislation. *Amici curiae* – various state agencies, local governments and others involved in water resource management – believe it is of critical national importance for the Court to clarify which principles properly define what is and is not a "navigable water" through the following question presented:

Whether federal jurisdiction over "navigable waters" extends to all waters that have any hydrologic connection with a navigable-in-fact water body, regardless of proximity and no matter how indirect, intermittent or ephemeral their connections may be?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
ARGUMENT	4
I. The Courts Of Appeals Are Deeply Divided Over The Reach Of "Navigable Waters" And Scope Of Federal Regulations Based Thereon	4
II. It Is Of Critical National Importance To State And Local Water Managers For This Court To Resolve The Conflict Below And Clarify The Meaning Of "Navigable Waters"	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

In re: Needham, ___ F.3d ___, 57 ERC 1673 (5th Cir. 2003) 6

Newdunn v. *United States Corps of Engineers*, 344 F.3d 407 (4th Cir. 2003) 5, 7

Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) 6

Solid Waste Agency of Northern Cook County v. *United States Corps of Engineers*, 531 U.S. 159 (2001) 3, 4, 5, 6

United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) 5, 7

United States v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003) 5, 7, 8

STATUTES

Clean Water Act §101(b), 33 U.S.C. §1251(b) 3

Clean Water Act §101(g), 33 U.S.C. §1251(g) 3

Clean Water Act §402, 33 U.S.C. §1342 3

Clean Water Act §402(p), 33 U.S.C. §1342(p) 3

Clean Water Act §404, 33 U.S.C. §1344 3

Fla. Stat. §373.016 2

Fla. Stat. §373.069 2

Fla. Stat. §373.069(2)(e) 2

Fla. Stat. §373.073 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

THE CLEAN WATER HANDBOOK (M. Ryan ed. 2003)..... 3

EPA, APPELLATE DECISIONS MAY RETURN WATER ACT BATTLE TO HIGH COURT, INSIDE EPA Vol. 24, No. 51 (Dec. 19, 2003)..... 6

INTEREST OF THE *AMICI CURIAE*

Amici curiae[1] – National Association of Flood and Stormwater Management Agencies, Florida Association of Special Districts, Florida Stormwater Association, South Florida Water Management District, and City of Clewiston – submit this brief to encourage granting the Petitions for Writs of Certiorari in *United States* v. *Deaton*, Case No. 03-701; *Newdunn* v. *United States Army Corps of Engineeers*, Case No. 03-637; and *Rapanos* v. *United States*, Case No. 03-929.

Amici include state agencies, local governments and a consortia of cities and local water management groups all with a strong interest in the clear and consistent interpretation of "navigable waters" – the term of art used to establish the geographic scope of federal jurisdiction under several significant federal regulatory programs, including the Clean Water Act and the Oil Protection Act. *Amici* are concerned with the reasonable and uniform application of those programs, which create distinct regulatory roles for the federal, state and local governments in the preservation and protection of all waters.

NAFSMA, established in 1979, represents more than 100 local and state flood control and stormwater management agencies. Its members are public agencies that protect lives, property and economic activity from storm and flood waters. NAFSMA is also focused upon the improvement of the health and quality of our nation's

[1] This brief is being filed concurrently with the written consents of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

waters. Its mission is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance its member's public service.

Florida Association of Special Districts is an association representing 89 special districts in the State of Florida, including 39 of the State's drainage districts. A large portion of the activities of drainage districts is the construction, operation and management of structures which control the movement of waters within their jurisdictions.

The Florida Stormwater Association (FSA) is a non-profit organization with almost 200 member cities and counties, water management districts, engineering firms, and others interested in surface water quality. FSA is an active participant in the development of stormwater management policy and works to create solutions to stormwater management problems that can be implemented by local governments. It provides training and education, information sharing and advocacy relating to water issues.

The South Florida Water Management District (SFWMD) is one of five water management districts with stewardship over Florida's public water resources. §§ 373.069 & 373.016, Fla. Stat. The District establishes and implements the State's water policies from Orlando to Key West. §§ 373.069(2)(e), 373.073 & 373.016, Fla. Stat. It operates a comprehensive water management system of levees, canals and flow diversion facilities designed to control and allocate the waters throughout the watersheds within its jurisdiction for flood control, water supply, and environmental purposes.

The City of Clewiston is a municipal corporation located in South Florida that has approximately 6,500 residents.

The *Amici,* their members and similar agencies nationwide are responsible for innumerable public works which today manage surface waters to provide flood control, water supply and protection for the natural systems. These public works are often subject to a variety of federal programs, including construction permits under the Corps § 404 dredge and fill program; Municipal Separate Storm Sewer Systems under § 402(p); and other National Pollutant Discharge Elimination System permits under § 402. Whether these federal regulatory programs apply to any given activity or facility depends, in large part, upon whether the waters involved are characterized as "navigable" or not. Congress left the remainder of the task of preventing water pollution to the States, with federal guidance, assistance, and oversight. See THE CLEAN WATER HANDBOOK 191-220 (M. Ryan ed. 2003).

Congress took seriously this division of responsibility between the federal government and the States, reflecting its intent to maintain States' traditional powers over water allocation and water and land use. See 33 U.S.C. § 1251(b) & (g). As this Court recently observed, the Clean Water Act must be interpreted with Congress's intent to maintain the federal-state balance of powers firmly in mind. *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159, 166-167, 173 (2001) (*SWANCC*).

Amici are also concerned that expanding federal CWA requirements to many areas far outside traditional navigable waters would mandate costly, time-consuming, and

burdensome bureaucratic proceedings, exposing water agencies to huge penalties for past violations, and interfering with the States' own highly developed pollution programs – consequences never intended by Congress.

For these and other reasons explained below, *Amici* urge the Court to clarify the principles enunciated in *SWANCC* and the proper scope of "navigable waters" while maintaining the proper federal and state balance in our partnership to restore and protect all of the nation's waters.

ARGUMENT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE REACH OF "NAVIGABLE WATERS" AND SCOPE OF FEDERAL REGULATIONS BASED THEREON.

The term "navigable waters" has been used by Congress for well over a century to define the reach of federal jurisdiction under several critical regulatory programs. Today it appears 215 times in the United States Code and 735 more times in the Code of Federal Regulations. Nonetheless, a definitive reliable test to determine what constitutes "navigable waters" remains strikingly elusive. The principles laid down by this Court in *SWANCC* to guide such determinations have instead become the subject of deep conflict among courts of appeals.

In *SWANCC*, the Court interpreted "navigable waters" to include waters with a "significant nexus" to a navigable-in-fact water body. 531 U.S. 159 (2001). Rejecting the United State's position, the Court explained that "In order to rule for [the government] . . . we would have to hold that

the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." Ibid. at 168 (emphasis original). Importantly for *Amici*, the Court recognized that "permitting [the Corps] to claim federal jurisdiction over ponds and mudflats would result in a significant impingement of the States' traditional and primary power over land and water use." Ibid. at 174.

Since *SWANCC*, the courts continue to differ over what constitutes a "nexus" significant enough to transfer jurisdiction over water use from state to federal regulators. Some courts apply a narrow test that requires waters to be "adjacent" to open waters to be considered navigable, while others accept *any* hydrologic connection as sufficient.

In the instant cases, the Fourth and Sixth Circuits found a "significant nexus" in slight, indirect, intermittent and arguably hypothetical hydrologic connections. For example, in *Deaton* the Fourth Circuit found federal jurisdiction over a roadside ditch located eight miles from a navigable-in-fact water. Similarly, the Fourth Circuit in *Newdunn* upheld the exercise of federal jurisdiction over waters found to be "remote" from navigable waters to which they were connected only by intermittent surface waters. In *Rapanos*, the Sixth Circuit again found jurisdiction over wetlands that were admittedly not themselves adjacent to navigable waters. Thus, these cases involve lands located significant distances from any traditionally navigable waters and with the most tenuous of hydrologic connections to them.

The Fifth Circuit has squarely rejected the Fourth and Sixth Circuit's proposition in these cases that any hydrologic connection creates a "significant nexus" to

navigable waters. In *Rice* v. *Harken Exploration Co.*, the court of appeals interpreted *SWANCC* to mean that "a body of water is [navigable] only if it is actually navigable or is adjacent to an open body of navigable water." 250 F.3d 264, 270 (5th Cir. 2001). More recently and pointedly, in *In re: Needham*, ___ F.3d ___, 57 ERC 1673 (5th Cir. 2003), the Fifth Circuit flatly stated that the Fourth and Sixth Circuit's view is "unsustainable under *SWANCC*," solidifying its position that a "significant nexus" requires not merely a remote hydrologic connection, but also some reasonable proximity. This conflict, expressly noted in *Needham*, is clear, deep and irreconcilable.

II. IT IS OF CRITICAL NATIONAL IMPORTANCE TO STATE AND LOCAL WATER MANAGERS FOR THIS COURT TO RESOLVE THE CONFLICT BELOW AND CLARIFY THE MEANING OF "NAVIGABLE WATERS."

The inter-circuit conflict over the question presented should be immediately resolved by this Court for several reasons.

1. The Court cannot expect the federal agencies to provide sufficient guidance to overcome this split among the courts of appeals. To the contrary, EPA and the Corps recently abandoned previously announced plans to address CWA jurisdiction and the principles enunciated in *SWANCC* through rulemaking, plainly leaving this conflict to be resolved by the Court. EPA, APPELLATE DECISIONS MAY RETURN WATER ACT BATTLE TO HIGH COURT, INSIDE EPA Vol. 24, No. 51 (Dec. 19, 2003). Continued percolation of this issue will simply add to the confusion and burdens described below.

2. Whatever the result, the *Amici* deserve clarity and uniformity in how the federal laws are applied. Water managers and local governments should not be subjected to different federal permitting depending upon which judicial circuit they operate. As it stands, the rights of *amici* improperly vary from circuit to circuit and remain increasingly uncertain in those circuits that have not decisively addressed the question presented here.

3. The almost limitless interpretation of "navigable waters" adopted in *Deaton*, *Newdunn* and *Rapanos* most certainly shifts the federal-state balance struck in the Clean Water Act. Virtually all water management and drainage districts, counties and cities traditionally use canals, ditches, culverts, gutters and other drainage works to manage surface waters. Where these are all considered "navigable waters" simply because waters from them *may* "eventually flow" to a water body that is actually navigable-in-fact, any distinction intended by the term "navigable" is lost.

As the scope of "navigable waters" expands, several Clean Water Act permitting programs become even more extensively applied to traditionally local water management activities. As the Deatons correctly point out, the present conflict obscures and confuses what is national and what is local. *Deaton* Br. 22. Congress should not lightly be assumed to have intended such a result. In fact, the Act should not be read so broadly absent a clear statement that Congress intended to so transform the balance of federal and state rights and responsibilities.

4. On a practical level, significant regulatory burdens, costs and delays will be added to important public works with the expansion of federal permitting. Where there is

no evidence of the waters actually reaching or harming any navigable water, these burdens are added for no identifiable environmental benefit. Moreover, programs such as the National Pollutant Discharge Elimination System lack the flexibility necessary to accommodate local concerns and will supplant local decision making and programs designed to allow systemic planning. State and local government resources remain increasingly hard pressed to handle growing urban, agricultural and natural systems needs. Additional burdens should neither be ignored nor so easily extended.

5. Finally, confusion among the courts of appeals creates heightened problems where as here, the federal regulatory scheme brings with it not only fines but the potential for criminal penalties including jail. See *Rapanos*. Given the conflicts amongst the courts of appeals, *Amici* increasingly risk unanticipated and unpredictable liabilities.

CONCLUSION

There are few issues more critical to state and local water managers, including counties, municipalities, flood control and drainage districts, and stormwater utilities than the need to clearly understand the scope and reach of the many federal regulatory programs under which they operate. The conflict among the Circuits has created confusion and uncertainty and should now be resolved by this Court.

The *Amici* therefore urge this Court to accept the petitions and resolve the question presented.

Respectfully submitted,

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January 2004

(3)

No. 03-929

In The

Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page

Interest of *Amicus Curiae* 1

Summary of the Argument 3

Argument 4

I. The Clear Split Among the Circuit Courts of Appeal Warrants a Grant of Certiorari. 4

A. The Fourth and Sixth Circuits: "Some Connection" to Navigable Waters is Enough to Support CWA Jurisdiction. 5

B. Fifth Circuit: "Some Connection is Not Enough – There Must be a "Direct Proximate Link" to Navigable Waters to Support CWA Jurisdiction. 9

II. The Confusion Created by the Regulatory Agencies in the Field Compels This Court's Involvement. 12

A. The Corps and EPA's Failure to Issue Guidance Furthers Confusion over the Extent of Their Jurisdiction. 12

B. The Disparate Regulation by Field Staff Stems From Federal Agency Inaction. 15

Conclusion 18

TABLE OF AUTHORITIES

CASES Page(s)

FD&P Enterprises, Inc. v. United States Army Corps of Eng'rs, 239 F. Supp. 2d 509 (D.N.J. 2003) 16

In re Needham, 354 F.3d 340 (5th Cir. 2003) 9, 10, 11, 12, 14, 16

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) 9, 10, 11

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) ..... *passim*

Treacy v. Newdunn Assocs. LLP, 334 F.3d 416, *petition for cert. filed,* 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637) 5

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701) 1, 5, 6, 8, 9, 16, 17

United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) 7, 8, 17

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929) 5, 7, 8, 9, 16

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 3, 4, 8, 11

United States v. Rueth Development Co., 335 F.3d 598 (7th Cir. 2003), *cert. denied,* 124 S. Ct. 835 (Dec. 1, 2003) 5

REGULATIONS

Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (2003) 13, 14, 15

OTHER

Press Release, Environmental Protection Agency and U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision, (December 16, 2003), *available at* http://www.epa.gov/newsroom 4, 12, 13, 14

Agency Implementation of the SWANCC Decision: Hearing Before the Subcomm. On Energy Policy, Natural resources and Regulatory Affairs of the Comm. on Government Reform,
107th Cong. 2d Sess. (2002) 12, 13

INTEREST OF AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as Amicus Curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 215,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry. Through the regular course of operating their businesses, NAHB's members are subject to regulations under the Clean Water Act ("CWA"). Therefore, NAHB is knowledgeable of the ramifications of inequitable regulatory actions and time-consuming processes that are often involved with land development.

NAHB is of counsel to James and Rebecca Deaton, landowners from Wicomico County, Maryland, who have submitted a petition that is pending before this Court and raises similar issues to those presented in Mr. Rapanos's petition. *See James S. Deaton, et ux. v. United States,* No. 03-701 (filed Nov. 13, 2003). The United States filed its response to the Deatons' petition on January 30, 2004. Mr. Rapanos's petition, like the Deatons' petition, presents another opportunity for this Court to resolve the conflict

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[1] Pursuant to Rule 37.6 of this Court, Amicus Curiae states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

and confusion regarding the scope of CWA "navigable waters" that is plaguing the lower courts, regulated officials, and our members who seek to develop their property.

Additionally, NAHB has been before the Court as *amicus curiae* or "of counsel" to the landowner in a significant number of land regulation cases. These include *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 280 F.3d 1364, *cert. granted in part,* 123 S. Ct. 2638 (June 27, 2003) (No. 02-262) (argued Jan. 14, 2004).

SUMMARY OF THE ARGUMENT

There is a direct conflict between the Fourth and Sixth Circuits on the one hand, and the Fifth Circuit on the other, regarding the scope of "navigable waters" under the Clean Water Act ("CWA" or the "Act"). The Fourth and Sixth Circuits support an expansive, virtually limitless theory of federal jurisdiction. They endorse an approach that allows the U.S. Army Corps of Engineers ("Corps") to assert control over features like ordinary ditches, drains and swales, merely if they have "some" connection or a "potential" link to truly navigable waters. The Fifth Circuit rejects such an expansive theory. It has expressly disavowed the opinions of its sister circuits, and instead requires a "direct, proximate" connection to navigable waters to justify the assertion of CWA jurisdiction – and thus the imposition of federal permitting and penalty requirements under the Act.

In this regard, the Fifth Circuit has been faithful to the mode of analysis employed by this Court, which has been largely ignored by the Fourth and Sixth Circuits. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("*Riverside*"), the Court upheld CWA jurisdiction over adjacent wetlands based on record evidence showing they "actually abut[ted]" and were "inextricably intertwined" with navigable waters. In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), the Court clarified *Riverside* in rejecting CWA jurisdiction over non-adjacent, isolated ponds that lacked a "significant nexus" to navigable waters.

Certiorari is warranted to definitely resolve the split between the circuits and their divergent interpretations of

Riverside and *SWANCC*. This Court's guidance is necessary because, after soliciting public input on the extent of CWA jurisdiction following the *SWANCC* decision, the agencies abruptly announced in December 2003 that they would abandon their efforts to issue "a new rule on federal regulatory jurisdiction over isolated wetlands."[2] Thus, the agencies relegated thousands of pages of public comments to doorstop status. Accordingly, with no regulatory guidance forthcoming from the Corps or EPA, this Court is the only realistically available forum to make sense of the judicial quagmire and provide landowners and regulatory agencies with some rationale for determining what falls within – and what falls outside – Corps and EPA authority. Without this Court's review, CWA jurisdiction will depend on the wholly fortuitous circumstance of where, and in what Circuit, the property at issue is located.

ARGUMENT

I. THE CLEAR SPLIT AMONG THE CIRCUIT COURTS OF APPEAL WARRANTS THIS COURT'S REVIEW.

In the last five months, four petitions have been submitted to this Court asking for guidance on the extent of federal CWA jurisdiction over "navigable waters."[3] With

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[2] *See* Press Release, Environmental Protection Agency and U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision, (December 16, 2003) ("December 16th Press Release"), *available at* http://www.epa.gov/newsroom.

[3] *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929) ("*Rapanos*"); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed*, 92 U.S.L.W. 3356

the filing of Mr. Rapanos's petition, three of them are now pending before the Court. The Court's involvement is necessary to address the split among the Circuit Courts of Appeal that has arisen.

A. Fourth and Sixth Circuits: "Some Connection" to Navigable Waters is Enough to Support CWA Jurisdiction.

In *Deaton* and *Rapanos*, the Corps asserted federal authority over remote drainage ditches that were miles away from navigable waters. The Fourth and Sixth Circuits, respectively, used the exact same language in upholding the Corps's authority:

> The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.

Deaton, 332 F.3d at 712; *Rapanos,* 339 F.3d at 452-53. As a consequence, both circuits have accepted as proper the Corps's apparent unrestricted ability to exert regulatory jurisdiction "over the whole tributary system of any navigable waterway []." *Deaton,* 332 F.3d at 712; *Rapanos,* 339 F.3d at 452-53.

In *Deaton*, the property is comprised of a twelve-acre parcel in rural Wicomico County, Maryland. *Deaton,* 332 F.3d at 702. The roadside ditch at issue is

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(U.S. Nov. 13, 2003) (No. 03-701) ("*Deaton*"); *United States v. Rueth Development Co.,* 335 F.3d 598 (7th Cir. 2003), *cert. denied,* 124 S. Ct. 835 (Dec. 1, 2003); *Treacy v. Newdunn Assocs. LLP,* 344 F.3d 416 (4th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637).

approximately two to three feet wide and at times carries water[4] and at other times is dry. *Deaton* Cert. Pet. at 5; *Deaton* Cert. Pet. App. at 78a (picture of roadside ditch). It "runs alongside the road between the pavement and the Deatons' property." *Deaton,* 332 F.3d at 702. The roadside ditch lies over eight miles from the nearest navigable-in-fact water, the Wicomico River, and "takes a winding, thirty-two-mile path to the Chesapeake Bay." *Deaton,* 332 F.3d at 702; *Deaton* Cert. Pet. at 5. The Corps never established that any sediment ever left the Deatons' property, or reached the roadside ditch. Nor did the Corps ever prove that water from the roadside ditch reached downstream navigable waters, or that sediment caused any damage to distant navigable waters. *See Deaton* Cert. Pet. at 7-8. (discussion of dye test). Indeed, a series of obstructions that includes five dams, three ponds and five culverts separates the Deatons' property from the Wicomico River. *See Deaton* Cert. Pet. App. at 77a.

Accepting the Corps' assertion of jurisdiction over tributaries as extending "to any branch of a tributary system that *eventually flows* into a navigable body of water[,]" the Fourth Circuit in *Deaton* found that there was simply "*a nexus* between a navigable waterway and its nonnavigable tributaries." *Deaton,* 332 F.3d at 711 and 712 (emphasis added). The Fourth Circuit misinterpreted *SWANCC* as "*suggesting* that covered non-navigable waters are those with *'some connection'* to navigable ones." *Deaton,* 332 F.3d at 709 (emphasis added).

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[4] The Fourth Circuit recognized that the parties were unable to agree on the amount of water and the consistency of the flow in the ditch. *Deaton,* 332 F.3d at 702; *Deaton* Cert. Pet. at 12.

Similar to the Deaton property, Mr. Rapanos's property is described as a "one hundred and seventy-five-acre plot of land in Williams Township, Bay County, Michigan." *Rapanos,* 339 F.3d at 448. In describing Mr. Rapanos's property, the District Court stated:

> [His] property is not directly adjacent to a navigable body of water; it is over twenty miles from Saginaw Bay, and it is roughly twenty miles from where the Kawkawlin River – the nearest body of navigable water – becomes navigable .... Like [Mr. Rapanos's] property itself, the wetlands were not directly adjacent to either the Saginaw Bay or the Kakawlin River.

United States v. Rapanos, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002), *rev'd* 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929). Water leaving the Rapanos property traverses a ditch, "dubbed the Labozinski drain, which empties into Hoppler Creek, which eventually winds its way into the Kawkawlin River, which in turn flows into Saginaw Bay." *Rapanos,* 190 F. Supp. 2d at 1014-15.

The district court, on remand from the Sixth Circuit following this Court's initial grant of certiorari,[5] disclaimed jurisdiction under *SWANCC.* The district court found "as a

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[5] On certiorari, the Supreme Court, in *Rapanos v. United States,* 533 U.S. 913 (2001), vacated the judgment and remanded for further consideration in light of *SWANCC.* On remand, the District Court dismissed. *See United States v. Rapanos,* 190 F. Supp. 2d 1011 (E.D. Mich. 2002). The Sixth Circuit reversed on appeal, 339 F.3d 447 (6th Cir. 2003), and that decision is the subject of the present Petition.

matter of law," that Mr. Rapanos's wetlands were not directly adjacent to navigable waters and therefore, under both *SWANCC* and *Riverside Bayview,* the federal government could not regulate them. *Rapanos,* 190 F. Supp. 2d at 1012.

On appeal, the Sixth Circuit disagreed with the lower court and, despite the distance between the wetlands and the navigable waters, held that there was "an ample nexus to establish jurisdiction" because Mr. Rapanos's wetlands were "adjacent" to a drain and a river. 339 F.3d at 453 (citing *Riverside Bayview,* 474 U.S. at 133). Continuing its analysis, the Sixth Circuit adopted the Fourth Circuit's analysis from *Deaton*: "[b]ecause we find the Fourth Circuit's reasoning persuasive, we disagree with the broad interpretation of *Solid Waste* taken by the district court in this case, *Rapanos,* 190 F. Supp. 2d at 1016, and, instead, agree with *Deaton,* 332 F.3d 698 at 708-9." *Rapanos,* 339 F.3d at 454.

In *Deaton* and *Rapanos*, despite the remoteness of the wetlands to navigable waters, and despite the lack of evidence of any impact in each instance, the Fourth and Sixth Circuits (respectively) held that these remote wetlands and roadside ditches fell within the sphere of the Corps' regulatory authority under the CWA. *Deaton,* 332 F.3d at 708, 711-12; *Rapanos,* 339 F.3d at 453. Significantly, both the Fourth and Sixth Circuits' purposeful choice of words disserved the principle announced by this Court in requiring a "significant nexus" to navigable waters. In *Deaton,* the Fourth Circuit found "a nexus" or "some connection" sufficient. *Deaton,* 332 F.3d at 711, 709 respectively. *Rapanos,* relying heavily on *Deaton,* found an "ample nexus" sufficient. *Rapanos,* 339 F.3d at 453.

B. Fifth Circuit: "Some Connection" is Not Enough – There Must be a "Direct, Proximate Link" to Navigable Waters to Support CWA Jurisdiction.

Unlike *Deaton* and *Rapanos*, the Fifth Circuit flatly rejected the United States' overbroad definition of "navigable waters" as covering "all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *In re Needham,* 354 F.3d 340, 345 (5th Cir. Dec. 15, 2003) ("*Needham*") (citing 40 C.F.R. § 300.5 (2003)). *See also Rice v. Harken Exploration Co.,* 250 F.3d 264, 269-70 (5th Cir. 2001) ("*Rice*"). Recognizing that the Fourth Circuit in *Deaton,* 332 F.3d at 702, and the Sixth Circuit in *Rapanos*, 339 F.3d at 449, agreed with the government's "expansive treatment," the Fifth Circuit countered by holding that in its view, such an all-inclusive definition is "unsustainable under *SWANCC*." 354 F.3d at 345 The Fifth Circuit stated:

> In our view, [the government's] definition [of 'navigable waters'] is unsustainable under *SWANCC.* The CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'

Needham, 354 F.3d 345-46 (internal citations omitted) (citing *Rice v. Harken Exploration Co.,* 250 F.3d 264, 269 (5th Cir. 2001)).

While the United States may declare that the Fifth Circuit's decision regarding the above-quoted language is dicta, in order to downplay the split among the circuits, that is simply not the case.[6] Rather, the Fifth Circuit adopted very precise language to emphasize that its position conflicted with the Fourth and Sixth Circuits when it held: "[I]n this circuit, the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like . . . ." *Needham,* 354 F.3d at 345. The Fifth Circuit correctly applied the adjacency requirements of *SWANCC* recognizing that "the Clean Water Act . . . [is] not so broad as to permit the federal government to impose regulations

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[6] In its Opposition in *Deaton,* the federal government dismissed any such conflict stating the *Needham* decision "does not squarely conflict" with the Fourth Circuit's decision in *Deaton.* Brief for the United States in Opposition at 18-19, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). Conversely, the majority of Amici Curiae filing petitions in support of the Deatons discuss this conflict among the circuits. *See, e.g.,* Brief of Amicus Curiae Hon. John R. Duncan, Jr., in Support of Petitioners at 15-16, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701); Brief of Amicus Curiae of the National Mining Association in Support of the Petition at 7-8, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701); Brief of Amicus Curiae of the Beaver Dam Public Drainage Association and John A. Rapanos in Support of the Petition at 56, 13-14, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701).

over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *Id.* (citing *Rice,* 250 F.3d at 269).

Needham's faithful adherence to *Riverside* and *SWANCC* entrenches the view of the Fifth Circuit, as earlier announced in *Rice v. Harken Exploration Co.,* 250 F.3d 264 (5th Cir. 2001). In *Rice,* decided just after *SWANCC,* the Fifth Circuit held that under *SWANCC,* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice,* 250 F.3d at 269. The court held that there was nothing to indicate that the creek at issue, or other unnamed intermittent creeks were "sufficiently linked" to the navigable-in-fact water. *Id.* at 271. Further, the court held that there must be "a close, direct and proximate link between . . . [the] discharges of oil and any resulting actual, identifiable oil contamination of natural surface water that satisfies the jurisdictional requirements of the OPA. *Id.* at 272. *See also Needham,* 354 F.3d at 346, n.9 (citing *Rice,* 250 F.3d at 272).

In *Needham,* the court reaffirmed the adjacency requirement identified in *Rice,* when it held "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. [] Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway." *Needham,* 354 F.3d at 346 and n.12 (citing *SWANCC,* 531 U.S. at 167; identifying the Corps' definition of adjacency as meaning "bordering, contiguous, or neighboring" in 33 C.F.R. § 328.3, and recognizing partial invalidation of that regulation by *SWANCC*).

In issuing the *Needham* opinion, the Fifth Circuit clearly identifies its position as being contrary to its sister circuits. Accordingly, the Court's review is necessary to resolve the appellate split that has emerged since *SWANCC*.

II. THE CONFUSION CREATED BY THE REGULATORY AGENCIES IN THE FIELD COMPELS THIS COURT'S INVOLVEMENT.

A. The Corps and EPA's Failure to Issue Guidance Furthers Confusion Over the Extent of Their Jurisdiction.

While multiple petitions addressing the meaning of "navigable waters" have been filed recently with the Court, Congress and the agencies have been struggling with the extent of CWA jurisdiction ever since *SWANCC* came down in 2001. Indeed, Congress held a hearing on the regulatory implications of *SWANCC*, which led to a promise from the Corps and EPA that they would clarify the scope of CWA jurisdiction to benefit both their field offices and the regulated community. But the agencies have broken their promise. They have made it clear that no regulatory guidance, in a rulemaking or otherwise, is forthcoming. *See* Press Release, Environmental Protection Agency and U.S. Army Corps of Engineers, EPA and Army Corps Issue Wetlands Decision (December 16, 2003) ("December 16th Press Release"), *available at* http://www.epa.gov/newsroom.

In 2002, the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, chaired by Representative Doug Ose, held a hearing concerning the EPA and Corps implementation of this Court's *SWANCC* decision. *See Agency Implementation of the SWANCC*

Decision: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the Comm. on Government Reform, 107th Cong. 2d Sess. (2002) (statement of Rep. Doug Ose, Chairman) ("Subcomm. Hearing"). During that hearing, Representative Ose recognized that the agencies' approach to determining CWA jurisdiction "has resulted in widely varying interpretations of the scope of jurisdiction . . . ." *Id.* at 2. Furthermore, Representative Ose explained that the "current situation is creating confusion and chaos" for the States[7] in that the lack of agency guidance concerning CWA jurisdiction "hinders States in their ability to implement their own programs to protect wetlands." *Id.* To address the confusion, the EPA and Corps agreed to conduct a rulemaking to clarify their position regarding CWA jurisdiction. Subcomm. Hearing at 32, 36, 38, 41, 53.

In 2003, the Corps and EPA issued an Advanced Notice of Proposed Rulemaking to "ensure that the regulations are consistent with the CWA and the public

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[7] *See also,* Brief of Amici Curiae of the Building Industry Legal Defense Foundation, *et al.* in Support of Petitioners at 2-8, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). Amici Curiae discuss specific examples of how water quality regulators in California are "improperly asserting jurisdiction under the CWA." *Id.* at 2. Amici Curiae include in their brief a series of examples such as: (1) regulating a "vertical-walled box culvert as waters of the United States that are swimmable"; (2) declaring a municipal "separate storm sewer system as always considered a Waters of the United States" that includes municipal streets, curbs, and gutters; (3) and best management practices implemented by a regional board that result in micro-management of local practices. *Id.* at 5-7.

understands what waters are subject to CWA jurisdiction." Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States" ("ANPR"), 68 Fed. Reg. 1991, 1993 (2003). Thus, the agencies recognized that their current regulations were causing confusion and that they needed to develop regulations to "clarify[] what waters are subject to CWA jurisdiction." *Id.*

However, after receiving thousands of pages of comments, the agencies announced, one day after the Fifth Circuit released its decision in *Needham,* that they would not move forward with rulemaking or otherwise issue any guidance at all to clarify the confusion. *See* December 16th Press Release. Through their press release, the EPA and Corps declined further agency action stating:

> After soliciting public comment to determine if further regulatory clarification was needed, the EPA and Corps have decided to preserve the federal government's authority to protect our wetlands. The agencies will continue to monitor implementation of this important program to ensure its effectiveness.

December 16th Press Release. The confusion still exists without any expected schedule for clarification from these agencies.

In light of the abandoned rulemaking on *SWANCC,* and without this Court's review, the lower courts have become the final arbiters on the scope of CWA jurisdiction. But they themselves are in a state of disarray. Everyone – including the agencies – will anticipate and scrutinize every federal trial and circuit court opinion in the absence of

reasoned agency decision-making. Indeed, the ANPR itself documents the divergent judicial views concerning those water bodies that are regulated under the CWA and those that are not. In a blatant abdication of their responsibilities, the Corps and EPA directed their field staff to make jurisdictional decisions on a "case-by-case basis" by "considering the relevant court decisions." 68 Fed. Reg. 1991, 1998.

Accordingly, on a nationwide level, property owners run significant risks of being subject to disparate civil and criminal enforcement actions by agencies that recognize the need to clarify their regulations, yet refuse to do so.

B. The Disparate Regulation by Field Staff Stems From Federal Agency Inaction.

Because the agencies have relied on court decisions to direct the public, landowners are now confronted with geographically disparate applications of the CWA. This subjects them to significant criminal and civil penalties based solely upon where their land is situated.[8] Thus, landowners with property in the Sixth and Fourth Circuit states of Kentucky, Michigan, Ohio, Tennessee, Maryland, Virginia, North Carolina, South Carolina and West Virginia are overly regulated because their property has "some connection" to or is "hydrological[ly] connect[ed]" to

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[8] *See also,* Brief of Amicus Curiae of Yellowstone Development LLC in Support of Petitioners, at 9-10, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). In its brief, Yellowstone Development discusses the significant due process considerations involved as a result of the Corps' failure to definitely resolve these issues. *Id.*

traditionally navigable waters. *See, e.g., Deaton*, 332 F.3d at 709; *Rapanos*, 339 F.3d at 453.

By contrast, land owned in the Fifth Circuit states of Mississippi, Louisiana and Texas will be regulated using the "significant nexus" standard this Court established in *SWANCC*.[9] Accordingly, jurisdiction in this region of the country will be determined by "a close, direct and proximate link." *See, e.g., Needham*, 354 F.3d at 346.

The Fourth and Sixth Circuit decisions in *Deaton* and *Rapanos* provide real examples of such an uneven exercise of jurisdiction.[10] In both cases, the government did not prove that the wetland activities in question negatively impacted any truly navigable water or that any pollutants were actually added into any truly navigable water.

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[9] Landowners in New Jersey will also be regulated under the "significant nexus" standard. *See FD&P Enterprises, Inc. v. United States Army Corps of Eng'rs,* 239 F. Supp. 2d 509, 516 (D. N.J. 2003). In *FD&P*, the court held that following *SWANCC,* the proper test is no longer the "hydrological connection test" but rather is the "significant nexus" test, as identified in *SWANCC*, for determining jurisdiction under the Clean Water Act. *Id.*

[10] *See e.g.,* Brief of Amici Curiae Nationwide Public Projects Coalition, *et al.* in Support of Petitioners, at 12-15, *United States v. Deaton,* 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed,* 92 U.S.L.W. 3356 (U.S. Nov. 13, 2003) (No. 03-701). In their brief, Amici Curiae identify the practical ramifications of the current circuit split. For example, in EPA Region Four, the region is comprised of states located within the Eleventh, Sixth, Fifth and Fourth Circuits. Thus, Corps and EPA regulators in that region, will be applying divergent standards regarding jurisdiction depending on which state, within Region Four, the site is located. *Id.* at 12.

Furthermore, in both cases, the government did not prove a constant and continuous surface water connection between the wetlands at issue and truly navigable waters. *See, e.g., Deaton* Cert. Pet. at 7-8 (dye test did not prove any hydrological connection between the roadside ditch and navigable waters); *Rapanos,* 190 F. Supp. 2d 1014 (stating that whether the wetlands "had any significant nexus to navigable waters [was] a critical fact left unresolved by the jury in this case"). Yet in both cases the government and the Circuit Courts ignored these facts, with each court holding that the wetlands were jurisdictional. However, in the Fifth Circuit, these facts would certainly be weighed in applying the "significant nexus" test identified by this Court and would likely lead to an opposite conclusion.

Granting certiorari would address the legal vacuum created by such unequal application of enforcement under the CWA, while serving to preserve the stated goals of Congress in enacting this piece of legislation.

CONCLUSION

If the Deatons' roadside ditch or Mr. Rapanos's wetland were located in the Fifth Circuit, they would not be regulated. Whether federal jurisdiction exists under a nationwide regulatory program should not depend on the wholly fortuitous circumstance of where in the country a particular piece of property is located.

The Supreme Court's involvement is urgently needed so the Corps can regulate with consistency and property owners know, up front, if the arm of the federal government properly reaches their land and triggers CWA permitting and penalty requirements.

DATED: March 1, 2004

Respectfully submitted,

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(6)

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In the

Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. IN VIOLATION OF DUE PROCESS THE FEDERAL GOVERNMENT FAILED TO PROVE AN ELEMENT OF THE CRIME FOR WHICH MR. RAPANOS WAS CONVICTED 3

II. CRIMINAL PROSECUTION UNDER THE VAGUE AND UNCERTAIN JURISDICTION OF THE CWA AS INTERPRETED BY THE SIXTH CIRCUIT VIOLATES DUE PROCESS 5

1. Mr. Rapanos' Conviction Raises Grave Constitutional Questions; Therefore, Due Process Requires a Reasonable Interpretation of the Act That Avoids the Constitutional Conflict 6

2. The CWA Is a Criminal Statute; Therefore, Due Process Requires an Interpretation of the Act in Favor of Lenity ... 8

3. The CWA Is a Federal Criminal Statute That Overlaps with State Authority; Therefore, Due Process Requires the Act to be Narrowly Construed 9

CERTIFICATE OF COUNSEL

TABLE OF AUTHORITIES

Page

Cases

Daniels v. United States, 532 U.S. 374 (2001) 2

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988) 7

Fiore v. White, 531 U.S. 225 (2001) 3-4

Hanousek v. United States, 528 U.S. 1102, 120 S. Ct. 860 (2000) 2

Jones v. United States, 529 U.S. 848 (2000) 6-9

Rewis v. United States, 401 U.S. 808 (1971) 8

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 168 (2001) 4-9

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 6

United States v. Bass, 404 U.S. 336 (1971) 9

United States v. Lopez, 514 U.S. 549 (1995) 6-7

United States v. Rāpanos, 235 F.3d 256 (6th Cir. 2000) 1

United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) 8

Statutes

33 U.S.C. § 1251(b) 9

§ 1319(c)(1) 1

§ 1319(2) 1

TABLE OF AUTHORITIES—Continued

Page

Court Rules

Supreme Court Rule 44.2 1

Miscellaneous

Poulos-Mobilia, Athy, *Ignorance or Mistake of Law—Will the Memory Ever Fade?:* People v. Marrero, 62 St. John's L. Rev. 114 (1987) 5

Petitioner, John A. Rapanos, respectfully moves this Court for an order vacating its denial of the petition for writ of certiorari, entered on April 5, 2004. This Court should grant the petition to review the merits or to set aside Petitioner's conviction. This petition for rehearing is timely filed in accordance with Supreme Court Rule 44.2.

This case offers compelling reasons for rehearing. This petition presents substantial grounds not previously presented (Rule 44.2) which the Court should consider—due process under the Clean Water Act (CWA) requires that the scope of federal jurisdiction be clearly defined.

Violations of the CWA carry severe penalties, including substantial fines and lengthy prison terms. *See* 33 U.S.C. §§ 1319(c)(1) and (2). After Mr. Rapanos was convicted of filling isolated wetlands without a federal permit, the government urged the trial court to give Mr. Rapanos *sixty-three* months in prison. But the trial judge, Chief District Judge Zatkoff, found such a sentence unwarranted because moving soil from one end of the property to another caused virtually no harm or risk to the environment. *See United States v. Rapanos*, 235 F.3d 256, 259 (6th Cir. 2000) (citing the lower court). With clear outrage, Judge Zatkoff stated:

> So here we have a person who comes to the United States and commits crimes of selling dope and the government asks me to put him in prison for ten months. And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and government wants me to give him sixty-three months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it.

Id. at 260.

This case is an example of the dangers inherent in a broadly interpreted regulatory scheme like the CWA. In their dissent to the denial of the petition for writ of certiorari in *Hanousek v. United States*, 528 U.S. 1102, 120 S.Ct. 860 (2000), Justice Thomas and Justice O'Connor warned of the injustice that could and has occurred under this Act. *Id.* at 861. They note, for example, that in some circuits the CWA is interpreted as "public welfare legislation" that allows criminal conviction without proof of criminal intent. *Id.* They also note that some courts have interpreted the felony provision of the CWA so that "a person may 'knowingly' violate the statute even if he is not aware that he is violating the law." *Id.* n.2. The result, the Justices argue, is that the "CWA imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities." *Id.* at 861. These are not the type of activities that a reasonable person should know is subject to stringent regulation and substantial criminal sanctions. *See id.* at 860. Therefore, the Justices counsel that the CWA should not be interpreted so as to subject countless numbers of people to "heightened criminal liability" for ordinary conduct. *Id.* at 861.

But the fact of the matter is that the lower courts have already done so. The Sixth Circuit in this case has held that federal CWA jurisdiction extends to any water body, including wetlands, which has a potential hydrological connection to a navigable water, even though this Court has never upheld federal jurisdiction over isolated or nonadjacent wetlands like those found on Mr. Rapanos' property.

The lack of a clear statement of federal authority under the CWA in the face of Mr. Rapanos' criminal conviction, and imminent sentencing to federal prison, for placing sand in isolated wetlands on his property, violates the principles of fundamental fairness inherent in due process. *See Daniels v. United States*, 532 U.S. 374, 386 (2001).

Notwithstanding this Court's CWA jurisprudence, no one knows the extent of federal jurisdiction under the CWA. This is clear from the split among the lower courts, the spate of cases like this case which have been petitioned to this Court for clarification, and the reported inability of federal officials to apply the CWA in a consistent jurisdictional manner.

In this case, the federal government failed to prove an element of the crime for which Mr. Rapanos was convicted. Moreover, because this Court has not provided a clear statement of federal jurisdiction under the CWA, neither Mr. Rapanos, nor anyone else, could have known that the filling of wetlands twenty miles from the nearest navigable waters would be proscribed by the Act. Thus, Mr. Rapanos has been deprived of due process of law.

I

IN VIOLATION OF DUE PROCESS THE FEDERAL GOVERNMENT FAILED TO PROVE AN ELEMENT OF THE CRIME FOR WHICH MR. RAPANOS WAS CONVICTED

In *Fiore v. White*, 531 U.S. 225 (2001), the Petitioner was convicted of violating a Pennsylvania law that prohibited the operation of a hazardous waste facility without a state permit. Although the State conceded that Fiore had a permit, the State argued that Fiore had deviated so far from its terms that he could be charged under the statute for failure to have a permit. After Fiore's conviction, the state supreme court interpreted the statute determining that "the statute meant what it said: The statute made it unlawful to operate a facility *without* a permit; one who deviated from his permit's terms was not a person *without* a permit." *Id.* at 227. But the state courts refused to overturn the conviction. This Court granted certiorari to decide "whether Pennsylvania can, consistent with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit." *Id.* at 228.

This Court held that the "Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.* at 228-29. In *Fiore*, the State failed to prove that Fiore did not have a valid permit.

This case is similar. Mr. Rapanos was convicted of violating the CWA that prohibits the discharge of fill into navigable waters without a federal permit. Although the government conceded that the wetlands Mr. Rapanos is accused of filling are not navigable-in-fact, the government argued that these wetlands were "navigable waters" because they have a potential hydrological connection to navigable waters twenty linear miles away. After Mr. Rapanos' conviction, this Court decided *Solid Waste Agency* in which this Court determined that the CWA does not apply to waters that are not adjacent to navigable waters. To rule for the government, this Court stated, "we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001).

Thus, as in *Fiore*, so in this case; Petitioner's conduct does not fall within the scope of the statute—properly interpreted—under which he was convicted. The federal government failed to prove an element of the crime—that the subject wetlands were *adjacent* to open or navigable waters. According to this Court's precedent, therefore, Mr. Rapanos' conviction and impending incarceration are not consistent with the demands of the federal Due Process Clause. *See Fiore*, 531, U.S. at 226. But, the Sixth Circuit has refused to overturn Mr. Rapanos' conviction, even on remand from this Court.

II

CRIMINAL PROSECUTION UNDER THE VAGUE AND UNCERTAIN JURISDICTION OF THE CWA AS INTERPRETED BY THE SIXTH CIRCUIT VIOLATES DUE PROCESS

"[D]ue process demands that criminal liability not be imposed when the accused cannot reasonably comprehend that the contemplated conduct is proscribed." *Ignorance or Mistake of Law—Will the Memory Ever Fade?:* People v. Marrero, 62 St. John's L. Rev. 114, 125-126 (1987), Athy Poulos-Mobilia. In this case, Mr. Rapanos had every reason to believe that his conduct was not proscribed by the CWA. The Act prohibits the discharge of fill material into "navigable waters" without a federal permit. The term "navigable waters" is not defined in the Act. Therefore, a plain reading of the statutory language suggests that the CWA would only apply to navigable-in-fact waters. Based on the plain text of the statute it would be incomprehensible to infer that the term "navigable waters" included isolated wetlands twenty miles from a navigable waterway. This Court came to the same conclusion in *Solid Waste Agency* where it determined that the term "navigable" shows that Congress relied on its traditional jurisdiction over navigable-in-fact waters for enacting the CWA. *Solid Waste Agency*, 531 U.S. at 172.

Moreover, in *Solid Waste Agency* this Court rebuffed the government's argument that section 404(a) is ambiguous and that the Court should extend *Chevron* deference to the Corps of Engineers' expansive interpretation that the CWA applied to nonnavigable, isolated, intrastate waters. *See Id.*

Based on the text of the CWA, Mr. Rapanos could not reasonably have comprehended that the filling of isolated wetlands on his property was proscribed by the CWA. Convicting a person of conduct he or she had no reason to believe was criminal is a clear due process violation.

Therefore, the courts have an obligation to interpret the CWA so as to effectively guide individual conduct.

1. Mr. Rapanos' Conviction Raises Grave Constitutional Questions; Therefore, Due Process Requires a Reasonable Interpretation of the Act That Avoids the Constitutional Conflict

In *Jones v. United States*, 529 U.S. 848 (2000), this Court stated as a "guiding principle," that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* at 857 (citing among others to *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909)). In *Jones*, the Petitioner was convicted under a federal statute prohibiting arson of any building that might affect interstate commerce. The government argued that the home to which Jones set fire was connected to interstate commerce because the homeowner had a mortgage and insurance with out-of-state providers and the home used natural gas from out of state. *Id.* at 855. But this Court found that if it adopted the government's expansive reading of the act, "hardly a building in the land would fall outside the federal statute's domain." *Id.* at 857. Given this Court's concerns as expressed in *United States v. Lopez*, 514 U.S. 549 (1995), wherein this Court invalidated a federal law prohibiting the mere possession of a gun in a school zone because the prohibited activity had nothing to do with commerce or economic activity, this Court rejected the government's troubling reading of the federal arson law: "We conclude that [the law] is not soundly read to make virtually every arson in the country a federal offense." *Jones*, 529 U.S. at 859. This Court, therefore, vacated the conviction.

Similarly, in *Solid Waste Agency*, this Court found that the government's assertion of authority over nonnavigable, isolated, intrastate waters, with a questionable connection to

interstate commerce, invoked the "outer limits" of Congress' Commerce Clause authority and raised "significant constitutional questions." *Id* at 172-74. Had this Court adopted the government's expansive interpretation of the act, hardly any water body in the land would fall outside the federal statute's domain. But as it had in *Jones*, this Court cited to *Lopez* for the proposition that Congress' authority "under the Commerce Clause, though broad, is not unlimited." *Id*. at 173. Thus, this Court stated, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id*. at 173 (citing *Edward J. DeBartolo Corp. v Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). In a footnote, this Court expressly found that it was not Congress' intent to push the limits of congressional authority: nothing "in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation." *Id*. at n.3.

This Court concluded: "We thus read the statute as written to avoid the significant constitutional . . . questions raised by respondents' interpretation" of the CWA. *Id* at 174. Nevertheless, Mr. Rapanos was convicted of filling wetlands that have no more significant a connection to interstate commerce than the home set afire in *Jones* and the proposed filling of isolated ponds in *Solid Waste Agency*. Mr. Rapanos was convicted of filling wetlands twenty miles from the nearest navigable water. Like the "Migratory Bird Rule" invalidated in *Solid Waste Agency*, the interpretation of the CWA applied to Mr. Rapanos pushes the "outer limits" of Congress' Commerce Clause authority and raises significant constitutional questions. It is fundamentally unfair to convict Mr. Rapanos under an expansive interpretation of the CWA that raises "grave and doubtful constitutional questions" when this Court has already

adopted a reading of the Act that avoids the constitutional problems and excludes Mr. Rapanos' conduct from federal enforcement.

2. The CWA Is a Criminal Statute; Therefore, Due Process Requires an Interpretation of the Act in Favor of Lenity

Another "guiding principle" upon which *Jones* relied is the requirement that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 529 U.S. at 840. (Citing *Rewis v. United States*, 401 U.S. 808, 812 (1971).) And, as with the courts' duty to adopt an interpretation of an act that avoids constitutional problems, "when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (Citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).) Section 404(a) of the CWA prohibits the discharge of fill material into "navigable waters." This is not a "clear and definite" statement that a crime is committed when one fills a wetland that lies twenty miles from the nearest "navigable waters." Indeed, this Court has never found that Congress expressed the intent in the CWA, clearly or otherwise, that the filling of nonnavigable, isolated, intrastate waters is prohibited. To the contrary, this Court found in *Solid Waste Agency* that the "clear and definite" language in the CWA indicates Congress' intent to regulate traditional navigable waters and wetlands immediately adjacent to those waters. *Solid Waste Agency*, 531 U.S. at 167-72. Moreover, this Court has never held that the CWA covers wetlands that are not adjacent to navigable waters. It is, therefore, fundamentally unfair to convict Mr. Rapanos for conduct that Congress has not proscribed with "clear and definite" language.

3. The CWA Is a Federal Criminal Statute That Overlaps with State Authority; Therefore, Due Process Requires the Act to be Narrowly Construed

This Court has instructed that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes." *Jones*, 529 U.S. at 858 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). In *Jones* this Court found that to read the Act "as encompassing the arson of an owner-occupied private home would effect such a change for arson is a paradigmatic common-law state crime." *Id.* Therefore, in the absence of a clear statement to the contrary, this Court held that the act must be more narrowly construed. *Id.* at 859. The courts "should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain." *Jones*, 529 U.S. at 860 (Stevens & Thomas, JJ., concurring).

In *Solid Waste Agency*, this Court determined that the government's expansive reading of the CWA to cover all isolated, intrastate, nonnavigable waters "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency*, 531 U.S. at 173. According to this Court, permitting the government to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. But rather than a clear statement from Congress that it desired to readjust the federal-state balance in this manner, this Court found that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." Therefore, this Court read the statute as written and avoided the federalism questions raised by the government's expansive interpretation.

It is fundamentally unfair to convict Mr. Rapanos of a crime based on an interpretation of the CWA that alters the federal-state framework, when this Court has determined that Congress clearly expressed a desire *not* to impinge on the rights of states to regulate remote and isolated local water bodies, like the wetlands on Mr. Rapanos' property.

CONCLUSION

For the reasons stated above, the petition for rehearing should be granted.

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CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is based on the grounds specified in Rule 44.2

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